

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

684

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,080

LOUISA GUNTHER FARCASANU

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE

Appellee.

*Appeal From The Tax Court
Of The United States*

APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 8 1970

Nathan J. Paulson
CLERK

(i)

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TAX COURT OF THE UNITED STATES
GENERAL DOCKET

DOCKET NO. 3533-82

CLASS

APPEARANCES FOR PETITIONER:

LOUISA B. GUNTHER PARASANY (AND. 3/29/61)
2812 N. Street, N. W.
Washington, D. C. 20007 PETITIONER.

NAME Bartholomew B. Ceyno, Esq. (App. ent 9/18/62)
927 - 15 th Street, N.W. Washington, D.C.
ADDRESS 20005

VS.

COMMISSIONER OF INTERNAL REVENUE.

RESPONDENT.

Date		Filings and Proceedings	Action	Served
Month	Day Year			
Sept. 6,	1962	PETITION FILED: FEE PAID 9/6/62		Sept. 6, 1962
Sept. 16,	1962	APPEARANCE of Bartholomew B. Ceyno, Esq. filed		Sept. 20, 1962
Sept. 19,	1962	ANSWER filed by resp.	GRANTED 9/20/62	Sept. 20, 1962
Sept. 19,	1962	REQUEST by resp. for trial at Washington, D. C.		Sept. 20, 1962
Oct. 7,	1962	NOTICE OF TRIAL at Washington, D.C. on Jan. 6, 1964.		Oct. 7, 1962
Dec. 31,	1962	MOTION by petr. for continuance from Jan. 6, 1964.	GRANTED Jan. 6, 1964 Cont'd Gen.	Jan. 16, 1964
		trial calendar at Wash. D. C.		
Dec. 31,	1963	NOTICE of Hearing on January 6, 1964, at Washington,		
		D. C. on petr. motion for continuance from Jan. 6,		
		1964.		Dec. 31, 1963

Mar. 6, 1964	HRG. before Judge Withey - Wash. D.C.		
	Petr's motion for continuance - GRANTED - 3/6/64		
	Continued Generally.		
Mar. 21, 1964	TRANSCRIPT of Hearing of January 6, 1964 received.		June 11, 1964
Mar. 11, 1964	NOTICE OF TRIAL at Washington, D. C. on Sept. 21, 1964.		
Aug. 6, 1964	MOTION by petr. for continuance from Sept. 21, 1964	GRANTED Aug. 26, 1964	
	trial calendar at Washington, D. C.		
Aug. 6, 1964	NOTICE of filing petr's motion for continuance,		Aug 5 1964
	HRG. on Sept. 9, 1964 Wash. D.C. (OBJ. due Aug. 26, 1964)		
Aug. 28, 1964	ORDER entered that Petr's motion for continuance	SEP 1 1964	
	is granted and case is stricken from the Sept. 21, 1964 Wash. D.C. session and is continued generally.		
March 8, 1965	NOTICE of TRIAL June 7, 1965 Washington, D.C.		March 8, 1965
Apr. 27, 1965	MOTION by petr. for continuance from June 7, 1965 trial	GRANTED (CONT'D. GEN.) May 26, 1965	
	calendar at Washington, D. C.		
April 28, 1965	NOTICE of filing petr. motion for continuance,	APR 28 1965	
	HRG. on May 26, 1965 Wash. D.C. (OBJ. due May 12, 1965)		
May 11, 1965	RESPONDENT'S objections to Petr's motion for continuance.		
	filed.		May 12, 1965
May 26, 1965	HEARING at Washington, D. C. by Judge Tietjens.		

	Petitioner's motion for continuance from June 7, 1965, Washington, D. C. Session - GRANTED.	
May 28, 1965	TRANSCRIPT of May 26, 1965 Wash. D.C. rec'd.	
Oct. 11, 1965	NOTICE of TRIAL at Washington, D.C., January 10, 1966.	Oct. 11, 1965
Dec. 2, 1965	MOTION by petr. for continuance from Jan. 10, 1966 trial calendar at Washington, D. C.	Jan. 7, 1966
Dec. 6, 1965	NOTICE of FILING Petr's motion for continuance; RES. on Dec. 22, 1965 Wash. D.C. (OBJ. due Dec. 17, 1965)	Dec. 22, 1965 Continued Gen. 6/26/66
Dec. 10, 1965	OBJECTIONS to petr. motion for continuance filed by resp.	Dec. 14, 1965
Dec. 22, 1965	RES. on Petr's motion for continuance - filed 12/2/65	
	GRANTED Dec. 22, 1965 Continued Generally.	
Dec. 23, 1965	TRANSCRIPT of Hearing of December 22, 1965 received.	
June 17, 1966	NOTICE of TRIAL at Washington, D. C., Sept. 12, 1966	June 17, 1966
July 21, 1966	MOTION by petr. for continuance of trial from Sept. 12, 1966 at Washington, D. C. (Denton's Statement attached).	Aug. 26, 1966
August 1, 1966	NOTICE of FILING of petitioner's motion for continuance and hearing on August 24, 1966 if objection filed by August 16, 1966.	AUG 1 1966
Aug. 17, 1966	OBJECTIONS to Petitioner's Motion for continuance filed by Respondent. (Leave to file Granted)	AUG 18 1966

TAX COURT OF THE UNITED STATES

GENERAL DOCKET

3533-02

DOCKET NO.

CLASS

APPEARANCES FOR PETITIONER

LOUISA B. GUNTHER PARCASANO (And. 3/29/61)

2812 N. Street, N. W.

Washington, D. C. 20007

PETITIONER.

VS.

COMMISSIONER OF INTERNAL REVENUE.

RESPONDENT.

Date		Filings and Proceedings	Action	Served
Month	Day Year			
Sept.	6, 1962	PETITION FILED: FREE PAID 9/6/62		Sept. 6, 1962
Sept.	18, 1962	APPEARANCE OF BROTHOLAN B. Cayne, Esq. filed		Sept. 20, 1962
Sept.	19, 1962	ANSWER filed by resp.	GRANTED	Sept. 20, 1962
Sept.	19, 1962	REQUEST by resp. for trial at Washington, D. C.	9/20/62	Sept. 20, 1962
Oct.	7, 1962	NOTICE OF TRIAL at Washington, D.C. on Jan. 6, 1964.		Oct. 7, 1962
Dec.	31, 1963	NOTION by petr. for continuance from Jan. 6, 1964	GRANTED	Jan. 16, 1964
		trial calendar at Wash. D. C.	Jan. 6, 1964 Cont'd Gen.	
Dec.	31, 1963	NOTICE of Hearing on January 6, 1964, at Washington,		
		D. C. on petr. motion for continuance from Jan. 6,		
		1964.		Dec. 31, 1963

	Petitioner's motion for continuance from June 7, 1965, Washington, D. C. Session - GRANTED.	
May 28, 1965	TRANSCRIPT of May 26, 1965 Wash. D.C. rec'd.	Oct. 11, 1965
Oct. 11, 1965	NOTICE of TRIAL at Washington, D.C., January 10, 1966.	Jan. 7, 1966
Dec. 2, 1965	MOTION by petr. for continuance from Jan. 10, 1966 trial calendar at Washington, D. C.	Dec. 22, 1965 Continued Generally
Dec. 6, 1965	NOTICE of Filing Petr's motion for continuance; RES. on Dec. 22, 1965 Wash. D.C. (OBJ. due Dec. 17, 1965)	Dec. 14, 1965
Dec. 10, 1965	OBJECTIONS to petr. motion for continuance filed by resp.	
Dec. 22, 1965	RES. on Petr's motion for continuance - filed 12/2/65	
	GRANTED Dec. 22, 1965 Continued Generally.	
Dec. 23, 1965	TRANSCRIPT of Hearing of December 22, 1965 received.	
June 17, 1966	NOTICE of TRIAL at Washington, D. C., Sept. 12, 1966	June 17, 1966
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August 1, 1966	NOTICE of filing of petitioner's motion for continuance and hearing on August 24, 1966 if objection filed by August 16, 1966.	AUG 1 1966
Aug. 17, 1966	OBJECTIONS to Petitioner's Motion for continuance filed by Respondent. (Leave to file granted)	AUG 18 1966

Aug. 24, 1966	HRO. on Petr's motion for continuance - DENIED. 8/24/66.	AUG 26 1966
Aug. 26, 1966	TRANSCRIPT of Aug. 24, 1966 Wash. D.C.	
Sept. 8, 1966	MOTION by petr. for continuance from Sept. 12, 1966 trial calendar at Washington, D. C.	SEP 9 1966
Sept. 9, 1966	NOTICE of Hearing on Sept. 12, 1966, Washington, D. C.	SEP 9 1966
Sept. 12, 1966	on petr. motion for continuance.	
Oct. 3, 1966	HQ. on Petr's motion for continuance - Granted in the	
	as this case is calendared for trial 11-17-66 at	
	Wash. D.C. Statement of David B. Voorhees, M.D. as to	
	Physical condition of petr. filed	
Oct. 3, 1966	ORDER that the trial of this case is continued to	
	Thursday Nov. 17, 1966 Wash. D.C.	Oct. 6, 1966
19, 1966	TRANSCRIPT of Sept. 12, 1966 Wash. D.C. read	
19, 1966	TRANSCRIPT of Oct. 3, 1966 Wash. D.C. read.	
Nov. 15, 1966	MOTION by petr. for continuance generally from	DENIED
	Nov. 17, 1966 at Washington, D. C.	Nov. 17, 1966
Nov. 17, 1966	HEARING at Washington, D. C. by Judge Kern.	Dec. 1, 1966
	Petr. motion for continuance of trial (filed 11/15/66)	
	DENIED November 17, 1966. (Case continued for trial	
	(Oral obj. by Resp.)	
	on January 9, 1967 at Washington, D. C.	

Nov. 17, 1966	ORDER, that retr. motion for a general continuance is denied, and further		Dec. 1, 1966
	ORDER, that case is continued for trial on January 9, 1967 at Washington, D.C.		
Nov. 25, 1966	TRANSCRIPT of Hearing of November 17, 1966 received.		
Dec. 20, 1966	NOTICE OF CHANGE OF CRIMINAL DATA to Hon. Jan. 16, 1967, at Wash., D.C.		Dec. 20, 1966
Jan. 26, 1967	TRANSCRIPT of Hearing of Jan. 16, 1967 received.		
Feb. 10, 1967	MOTION by resp. to quash subpoena duces tecum relating to Mrs. Franklin Mott Gunther.	DENIED Feb. 10, 1967	FEB 10 1967
Feb. 10, 1967	MOTION by resp. to quash subpoena duces tecum relating to Franklin Mott Gunther.	GRANTED Feb. 10, 1967	FEB 10 1967
Feb. 13, 16, 1967	TRIAL at Washington, D.C. by Judge Korn.		
	Stipulation of Facts with exhibits filed. (2/13/67)		
	ORIGINAL EXHIBITS DEB - April 17, 1967		
	REPLY EXHIBITS DEB - May 17, 1967		
	UNDER SUPERVISION - JUDGE ADAMS		
Mar. 3, 1967	TRANSCRIPT of Trial of Feb. 13 & 16, 1967 received. (C)		
March 15, 1967	ORDER resp. motion to reconsider - granted in part, further ordered		
	that petrs' obj. to admission into evidence of Ex.D. be overruled as		
	to items 3, 4, 5, 7, 8, 9, 10, 11, 12, & 14, which said items		

	are hereby admitted into evidence, and are sustained as to the other items and her objections to admission into evidence Ix.K be overruled as to items 6,7,8, which items are hereby admitted into said evidence, and are sustained as to the other items therein; and it is further ordered, that pursuant to understanding with counsel, the record be reopened for the purpose of permitting petr. to adduce testimony in rebuttal of such items in Exhibits J and K, which have been admitted as specified above, and for no other purpose; and Further Ordered that/this end this case be set for further trial on Wednesday March 29, 1967
March 29, 1967	Wash. D.C. (Courtroom No. 1)
	TRIAL at Washington, D.C. by Judge Kern.
	Case re-opened by Court's Order dated 3/15/67 for further trial relative to Resp. exhibits J and K.
	Record closed - case - SUBMITTED.
	Supplemental Stipulation of Facts filed with joint exhibits
	Joint motion to change caption of case filed - GRANTED 3/29/67.
	ORIGINAL BRIEF EXTENDED TO - May 15, 1967
	REPLY BRIEF EXTENDED TO - June 14, 1967

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	Decision will be entered under Rule 50.		
Oct. 16, 1968	MOTION for New Trial, filed by Petitioner.	DENIED 11/29/68	Dec. 2, 1968
Oct. 16, 1968	MOTION by petr. for extension of time to file points and authorities in support of petr's motion for new trial, to and including Nov. 15, 1968.	GRANTED 10/17/68	Oct. 17, 1968
Nov. 15, 1968	MOTION by petr. to extend time to Nov. 22, 1968, to file points and authorities in support of petr's motion for New Trial.	GRANTED Nov. 22, 1968	NOV 18 1968
Nov. 22, 1968	Points and Authorities in support of Motion for New Trial, filed by petitioner.		Nov. 25, 1968
Dec. 2, 1968	MOTION by petr. to open record to introduce exhibit in support of petr's Motion for new trial. (Treaty and explanatory memorandum attached)	DENIED 12/3/68	Dec. 4, 1968
Jan. 13, 1969	AGREED COMPUTATION filed		
Jan. 15, 1969	DECISION entered Judge Korn		JAN 15 1969
	APPELLATE PROCEEDINGS		
Jan. 14, 1969	NOTICE of Appeal to U.S.C.A., D.C. Circuit, filed by petitioner.		Apr. 15, 1969
Jan. 15, 1969	NOTICE with copy of notice of appeal sent to Richard M.		

Apr. 15, 1969			
Apr. 15, 1969			

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MEMORANDUM

The above named petitioner hereby petitions for a reconsideration of the deficit by and forth by the respondent Commissioner of Internal Revenue in his notice of deficiency (copy of which, dated June 27, 1950, and of correct caption, the petitioner heretofore received).

1. The petitioner is an individual resident, at this address, at the time of the filing of the petition for the period here involved and filed with the District Director of Internal Revenue, Baltimore, Maryland.

2. The notice of deficiency (a copy of which is attached hereto and marked "Exhibit A") was filed to the petitioner on June 27, 1950.

3. The deficiencies as determined by the Commissioner are in income taxes for the calendar year 1949 in the amount of \$47,530.00, which entire amount is in dispute.

4. The determination of Internal Revenue in said notice of deficiency is based upon the following grounds:

(a) The Internal Revenue Service acted in holding that the year reported herein, which certain activities and losses" included in the petition of 1949 is due to return to the amount of \$211,671.19 in net after the ordinary deduction of the 1951 Internal Revenue Code, and applicable to the year, in the amount claimed on any other amount.

(b) The Internal Revenue Service acted in holding that the petitioner failed to include in gross income a long-term capital gain in the amount of \$3,346.44, less deduction for

In 1937, the United States, 1937, only within the limits of the to the petitioners by the United States Government for the United States Government made to the petitioners by the United States Government for the United States Government of the United States Government of the United States Government of 1937, as a and B, with respect to the United States Government property seized without compensation by the Government of the United States during 1937.

5. The facts upon which the petitioners rely as the basis of their case are as follows:

(a) Franklin D. Roosevelt, President of the United States, was only appointed in 1937 as United States Minister Plenipotentiary to Mexico.

(b) The said Franklin D. Roosevelt and the petitioners were requested by the then President, Franklin D. Roosevelt, and the then Secretary of State, Cordell Hull, to carry the United States legation to Mexico, Mexico, with the required furniture, furnishings, objects d'art, and other equipment to insure that the United States is appropriately represented. While funds for furnishing the said legation were not available.

(c) Pursuant to the said request, the petitioners and Lee Ireland furnished the said legation with their own personally owned and valued at \$12,776.15 and which was subject to replacement, Mexico, at the expense of the United States Government. The majority of the said personally owned and valued by the petitioners with their own funds.

(d) The United States Government then entered into a contract with the said Lee Ireland and the petitioners to guarantee the non-damage and return to the petitioners and the said Lee Ireland of the

said personality at the termination of the said said service.

(a) The said Franklin H. Gaither, while in office as aforesaid, died in Romania, in exile, on November 27, 1942, at the age of 57 years, having then reached thirty-four years as a career diplomat for the United States Government.

(2) Thereafter the petitioner was unable to remove from him the help of his husband, or the personality hereinabove referred to, because of the state of war which existed between the United States and its allies on and after December 11, 1941.

(3) The will of the aforesaid Franklin H. Gaither, which left all his relevant tangible personality to the petitioner, was probated in Leon County, Florida, where the said deceased was domiciled. The federal estate tax return for the said deceased did not include in the deceased's estate any of the personality situated in Romania.

(4) The aforesaid personality was not seized during World War II, and was still intact when the petitioner returned to Rochester, New York, in 1946, and regained possession of it.

(5) The petitioner was thereafter unable to remove either her husband's help, or the aforesaid personality, which retained its diplomatic status, from Romania because of the circumstances by Communist rule and uprising, which disrupted law and order, and directly led to the establishment of a Communist regime in Romania.

(6) Thereafter the petitioner learned that in 1947, the aforesaid Communist terrorist gangs, acting under color of authority, stole as follows, of the aforesaid personality of the taxpayer, valued at \$2,572.00.

(1) The United States Government, in the settlement of accounts of United States troops in 1947.

(2) The petitioner, in 1947, with permission and protection of United States authorities, attempted to obtain compensation for various losses of the United States, and finally, on October 2, 1947, filed a claim, in her own right, with the Foreign Claims Commission of the United States for the amount of \$100,000.00 (claim No. 100 - 2557). On June 1, 1948, the said Commission awarded the petitioner the amount of \$100,000.00, liquidated damages and interest, of the principal amount, \$100,000.00 paid, which sum, after expenses and attorney's fees, was reduced to \$90,000.00, the net amount received by the petitioner in 1948. The Government was able to obtain the full amount of the award in cash of \$100,000.00.

(3) In 1948 it was as certain that the petitioner would not be able to recover in any way by the American Government, the United States Government, or any agency thereof, for the loss of personally suffered as described.

(4) Thereafter, the petitioner attempted to claim as a deduction in her 1948 Federal Income Tax return, the amount of \$100,000.00, representing the difference between the amount of her actual loss, \$100,000.00 of the principal, and the amount awarded the petitioner by the Government Foreign Claims Settlement Commission, \$90,000.00, which deduction was disallowed by the Internal Revenue Service.

(5) In addition to the claim set out in paragraph (3), also, the Internal Revenue Service requested that the petitioner as a long-term obligation, the net sum of

\$103,716.43 Jan. 10, 1939, actually collected in 1939 by the petitioner on the credit from the Foreign Service Letter and to direct.

The petitioner prays that, after leaving this proceeding, the Court:

(1) Order the petitioner a deduction in her 1939 income tax in the amount of \$103,716.43 as a loss for personal property stolen from the petitioner.

(2) Reorder the said deduction, in toto, the assessment against petitioner as of a capital gain in the amount of \$103,716.43 Jan. 10, 1939, collection, allegedly arising from payments made to petitioner pursuant to an order of the Foreign and Ins Settlement Commission of the United States Government.

(3) Grant such other and further relief to the petitioner as to the Court may seem just and equitable.

1st Louis B. Hunter
 Petitioner
 2217 K Street, N. W.
 Washington, D. C.

CORRECTION TO THE ABOVE:

Corrected: Harlowe Post

cc:

Harlowe Post, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and those she believes to be true.

1st Louis B. Hunter
 Petitioner

[Subscription Omitted in Printing]

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Section 14. Credits

Section 14

A copy of this document has been referred to the Department of the Treasury, 729 15th Street, N.W., Washington, D.C.

in accordance with the authority contained in the power of attorney executed by you.

Taxable Year ended 1959 July 31, 1960

Adjusted taxable income

Exempt income as disclosed by return \$ (245,313.97)

Unallowable deduction and additional income

(a) Other deductions - Other than the foreign settlement deduction

\$102,271.50

(b) Long-term capital gain

11,691.82

223,853.72

Total

\$ 103,623.75

Nontaxable income and additional deductions

11,691.82

Corrected taxable income

\$ 100,813.72

Explanation of Adjustments

(a) It is held that the loss, captioned "Claim against foreign settlement deduction," deducted in your 1959 income tax return in the amount of \$102,271.50, is not allowable under any provision of the Internal Revenue Code of 1954 in the event of a refund or in any other event.

(b) It is held that you failed to include in your income a long-term capital gain in the amount of \$11,691.82, which is due to you by the United States Treasury Department under an award made to you by the Foreign Claims Settlement Commission of the United States under the International Claims Settlement Act of 1949, as amended, with respect to certain personal property taken, without compensation by the Government of Russia during 1947.

Prepared by the U.S. Treasury Department, July 15, 1960

July 15, 1960
Rev. No. 75, 1959

\$ 1,000.00

32,700.00

Total gain in 1959	\$23,702.40
Less: Sales tax fees and other expenses	<u>10,366.95</u>
Net amount received in 1959	\$23,335.45
Excess for computing gain (fair market value of the property at December 22, 1951, date of death of your late husband, Franklin Holt (deceased), which value will be included in the property being the basis of the gain of 1959)	<u>None</u>
Long-term capital gain	\$23,335.45
Less 50% deduction	<u>11,667.73</u>
Amount taxable	\$11,667.72

Summary

Net long-term capital gain shown on return	\$162,117.30
Long-term capital gain, adjusted (40%) above	<u>23,335.45</u>
Total net long-term capital gain as adjusted	\$185,452.75
Less: 50% deduction	<u>92,766.87</u>
Taxable long-term capital gains as adjusted	\$ 92,766.87

Note: In the following computation a foreign tax credit was not allowed inasmuch as a credit of \$25.50 was claimed on the return and included in the foreign tax shown on the return. This overpayment was applied as a credit to the 1959 other local tax, as follows:

Payments on 1959 Declaration of Estimated Tax	\$3,000.00
Foreign tax credit	<u>25.50</u>
Credit on 1959 estimated tax	\$3,025.50

Income Tax for 1959

Computation of Income Tax	\$ 160,813.75
Less: 50% of excess of net long-term capital gain over net short-term capital loss as adjusted	<u>23,766.87</u>
Balance	\$ 8,046.88
Partial tax (\$1,950.00 plus 3 1/2% of \$8,046.88)	\$ 1,975.94
Add: 25% of excess of net long-term capital gain over net short-term capital loss	<u>46,383.44</u>
	\$ 48,359.38

income tax

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Less: Credit for income tax payments to a foreign
country or U.S. Possession

\$ None

Dividends received credit

437.30

Retirement income credit

None

437.30

\$ 47,922.03

Balance

None

Plus: Self-employment tax

\$ 47,922.03

Income tax liability

None

Income tax liability disclosed by return, 1966 to 1967, 1968 to 1969

\$ 47,922.03

Deficiency of income tax

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE
OFFICE OF REGIONAL COMMISSIONERS

APPELLATE DIVISION

Room 2317

Internal Revenue Building
12th & Constitution Ave.
Washington 25, D.C.IN REPLY REFER TO
Ap:Wash:W1Mrs. Louise B. Gantner
2512 H Street, N.W.
Washington, D.C.

JUN 12 1959

TAXABLE YEAR ENDED	DEFICIENCY
12-31-59	\$17,922.03

Dear Mrs. Gantner:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of your income tax liability for the above-noted taxable year(s) discloses a deficiency (or deficiencies) in the amount(s) shown above. The attached statement shows the computation of the deficiency or deficiencies.

IF YOU AGREE to this determination, please sign the enclosed agreement, Form 870, and return it promptly to this office. An addressed envelope is enclosed for this purpose. The signing and filing of this agreement will permit an early assessment of the deficiency or deficiencies and will limit the accumulation of interest.

IF YOU DO NOT AGREE, and do not sign and return the enclosed form, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of ninety days from the date of this letter, unless within that time you contest this determination in the Tax Court of the United States by filing a petition with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

Mortimer K. Caplin

Commissioner

By

Harold L. Erickson
Special Assistant
Appellate Division

Enclosures:

Statement

Agreement, Form 870

Addressed envelope

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SUMMARY

Amount Due
March 1, 1961

12 1/2% of \$1,000,000
\$125,000.00
\$125,000.00

Tax liability for taxable year 1961 \$125,000.00

Balance Due
March 1, 1961

\$125,000.00

In making this determination of your income tax liability, we have considered the information reported on your examination, a copy of which was furnished to you on April 27, 1961. We have also considered the information reported on July 17, 1961; and to the extent it is in the conference held on October 3, 1961.

[Caption Omitted in Printing]

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1962 SEP 19

TAX COURT
OF THE
UNITED STATES

ANSWER

THE PETITIONER, in answer to the petition filed in the above-captioned case, admits and denies as follows:

1. to 3., inclusive. Admits the allegations of paragraphs 1 to 3, inclusive of the petition.

4. (a) and (b). Denies that the Commissioner acted as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. (a) to (d), inclusive. Denies the allegations of subparagraphs (a) to (d), inclusive of paragraph 5 of the petition.

5. (e). Admits that liquidation No. 5011 was filed in District Court, Eastern District of New York, on December 22, 1944. Denies the remaining allegations of subparagraph (e) of paragraph 5 of the petition.

5. (f). Denies the allegations of subparagraph (f) of paragraph 5 of the petition.

5. (g). Admits the allegations of subparagraph (g) of paragraph 5 of the petition.

5. (h) to (j), inclusive. Denies the allegations of subparagraphs (h) to (j), inclusive of paragraph 5 of the petition.

5. (k). Admits the allegations of subparagraph (k) of paragraph 5 of the petition.

5. (1). Admits that the petitioner filed a claim with the Foreign Claims Settlement Commission of the United States in the amount of \$295,706.00 (Claim No. 100-30567). Petitioner claims that on June 8, 1959, the said Commission awarded the petitioner the amount of \$253,793.74.

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including paragraph 3 and item 12b. Further, it was stated that of the amount of \$23,700.00, \$10,000.00 was paid to the petitioner in 1959. Further, the remaining allegations of paragraph 3 (b) of paragraph 5 of the petition.

5. (b). Further the allegation of paragraph 3 (b) of paragraph 5 of the petition.

5. (c). Further that the petitioner also paid to the State in her 1959 Federal Income tax return the amount of \$159,800.00, which deduction was disallowed by the Internal Revenue Service. Further the remaining allegations of paragraph 3 (b) of paragraph 5 of the petition.

5. (d). Further that the Internal Revenue Service provided in petitioner's prior income tax return to the State, the sum of \$23,386.45 less 50 per cent, which amount was received by petitioner in 1959 as the amount from the Foreign Office for the State. Further the remaining allegations of paragraph 3 (b) of paragraph 5 of the petition.

6. Further generally each and every allegation of the petition not hereinbefore specifically stated, is denied as stated.

Very truly yours, It is ordered that the Commissioner directed by the respondent be in all things the respondent.

Respectfully,
G

CHARLES C. HARRIS
Chief Counsel

Internal Revenue Service

OF 600,000

DAVID H. HOFFER
Attorney General

ALBERT H. HOFFER
Attorney General
Internal Revenue Service
2000 Internal Revenue Building
Washington 25, D. C.

[Caption Omitted in Printing]

STIPULATED ALLEGES

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part thereof; provided, however, that either party has the right to object to the admission of such facts and exhibits in evidence on the grounds of materiality and relevancy; further provided that either party may introduce other and further evidence not inconsistent with the facts and exhibits herein stipulated.

In stipulating exhibits herein, the parties are agreeing only to the authenticity of the exhibits and not to the truth of any facts stated therein. Either party may introduce further evidence consistent or inconsistent with any fact stated in any exhibit.

1. The petitioner, Louise B. Guther, during the calendar year 1959 and at the time of filing the petition herein, resided in Washington, D. C. Her federal income tax return for 1959 was filed with the District Director of Internal Revenue at Baltimore, Maryland. A copy of the return is attached and marked Joint Exhibit 1 A.

2. Franklin Most Guther, then husband of the petitioner,

was appointed in 1937 as United States Minister plenipotentiary to Romania.

3. A copy of a letter dated August 12, 1946, from the Security Storage Company is attached as Joint Exhibit 2-1.

4. A state of war was declared between the United States and Rumania on December 11, 1941.

5. Franklin Mott Graham died in office in Bucharest, Rumania, on December 22, 1941 at the age of 56, having served during his lifetime approximately 75 years in the United States foreign service.

6. The petitioner did not remove from Rumania the body of her husband. The body of Franklin Mott Graham is still buried in Rumania.

7. The petitioner returned to the United States early in 1942.

8. Franklin Mott Graham's will was probated in the Court of the County Judge, Leon (or St.), Florida. A copy of the will is attached and marked as Joint Exhibit 3-0.

9. The petitioner as executrix of her husband's estate, filed a Federal Income Tax return, a copy of which is attached and marked as Joint Exhibit 4-0.

10. The petitioner returned to Romania in November, 1945.

11. The petitioner returned to the United States early in 1947.

12. In September 1947, a treaty between the United States and the Union of Soviet Republics.

13. During the war, the United States had nationalized certain assets of the Rumanian Government and Rumanian citizens in the amount of \$22,826,873.10, which were held at the time of the 1947 treaty, a copy of which is attached as Joint Exhibit 5-B.

14. A copy of a press release from the United States Department of State dated March 17, 1949, No. 155 is attached as Joint Exhibit 6-A.

15. A claim against the Rumanian Government was filed by the petitioner with the Foreign Claims Settlement Commission in September, 1946, Claim No. FCS-30567. A copy of her claim with exhibit "2" attached is attached hereto as Joint Exhibit 7-B. A copy of the final decision with respect to this claim is attached hereto as Joint Exhibit 8-A.

16. Pursuant to an award of the Foreign Claims Commission, the petitioner received \$33,702.46 in 1956 of which \$10,395.95 was paid in attorney's fees and expenses with respect to the claim.

17. In 1961, the petitioner received \$370.78 as a further payment under the award.

18. In 1959 and 1960, representatives of the United States and the government of Rumania were engaged in negotiations concerning the payment of claims to United States nationals with respect to property seized by Rumania.

19. In 1959, a letter was received from the United States which the Internal Revenue Service had received from the United States \$2,500,000.00 on certain claims over the period 1950 through 1964, including other items of compensation. A copy of a press release from the United States Department of State dated March 30, 1960, No. 151 is attached as Exhibit 5-1.

20. Attached hereto and marked as Exhibit 10 and 11 are two letters to the Chairman from the Executive of the Hermonell House dated October 3, 1962.

21. Attached hereto and marked as Exhibit 12 is a letter from John M. Connolly, of the Security Storage Company dated February 3, 1967.

(s) *Burton H. B. Blyne*
 Counsel for Defendant

(s) *Lester R. Uitzig*
 Lester R. Uitzig
 Chief Counsel
 Internal Revenue Service

PART VI

ECONOMIC CLAUSES

Article 24

1. In so far as Roumania has not already done so, Roumania shall restore all legal rights and interests in Roumania of the United Nations and their nationals as they existed on September 1, 1939, and shall return all property in Roumania, including ships, of the United Nations and their nationals as it now exists.

If necessary, the Roumanian Government shall revoke legislation enacted since September 1, 1939, in so far as it discriminates against the rights of United Nations nationals.

2. The Roumanian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Roumanian Government in connection with their return. The Roumanian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between September 1, 1939, and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Roumanian authorities not later than twelve months from the coming into force of the Treaty, except in cases in which the claimant is able to show that he could not file his application within this period.

3. The Roumanian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

4. (a) The Roumanian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Roumania, he shall receive from the Roumanian Government compensation in lei to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Roumanian nationals.

(b) United Nations nationals who held, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9(a) of this Article, but which have suffered a loss by reason of injury or damage to property in Roumania, shall receive compensation in accordance with sub-paragraph (a) above. This compensation shall be calculated on the basis of the total loss or damage suffered by the corporation or association and shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation or association bear to the total capital thereof.

(c) Compensation shall be paid free of any levies, taxes or other charges. It shall be freely usable in Roumania but shall be subject to the foreign exchange control regulations which may be in force in Roumania from time to time.

(d) The Roumanian Government shall accord to United Nations nationals the same treatment in the allocation of materials for the repair or rehabilitation of their property in Roumania and in the allocation of foreign exchange for the importation of such materials as applies to Roumanian nationals.

(e) The Roumanian Government shall grant United Nations nationals an indemnity in lei at the same rate as provided in sub-paragraph (c) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Roumanian property. This sub-paragraph does not apply to a loss of profit.

5. The provisions of paragraph 4 of this Article shall not apply to Roumania in so far as the action which may give rise to a claim for damage to property in Northern Transylvania belonging to the United Nations or their nationals took place during the period when this territory was not subject to Roumanian authority.

6. All reasonable expenses incurred in Roumania in establishing claims, including the assessment of loss or damage, shall be borne by the Roumanian Government.

7. United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Roumania by the Roumanian Government or any Roumanian authority between the date of the Armistice and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

8. The owner of the property concerned and the Roumanian Government may agree upon arrangements in lieu of the provisions of this Article.

9.-As used in this Article:

(a) "United Nations nationals" means individuals who are nationals of any of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status at the date of the Armistice with Roumania.

The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Roumania during the war, have been treated as enemy;

(b) "Owner" means the United Nations national, as defined in sub-paragraph (a) above, who is entitled to the property in question, and includes a successor of the owner, provided that the successor is also a United Nations national as defined in sub-paragraph (a). If the successor has purchased the property in its damaged state, the transferor shall retain his rights to compensation under this Article, without prejudice to obligations between the transferor and the purchaser under domestic law;

(c) "Property" means all movable or immovable property, whether tangible or intangible, including industrial, literary and artistic property, as well as all rights or interests of any kind in property. Without prejudice to the generality of the foregoing provisions, the property of the United Nations and their nationals includes all seagoing and river vessels, together with their gear and equipment, which were either owned by United Nations or their nationals, or registered in the territory of one of the United Nations, or sailed under the flag of one of the United Nations and which, after September 1, 1939, while in Roumanian waters, or after they had been forcibly brought into Roumanian waters, either were placed under the control of the Roumanian authorities as enemy property or ceased to be at the free disposal in Roumania of the United Nations or their nationals, as a result of measures of control taken by the Roumanian authorities in relation to the existence of a state of war between members of the United Nations and Germany.

Article 32

1. Any disputes which may arise in connection with Articles 23 and 24 and Annexes IV, V and VI, part B of the present Treaty shall be referred to a Conciliation Commission composed of an equal number of representatives of the United Nations Government concerned and of the

Roumanian Government. If agreement has not been reached within three months of the dispute having been referred to the Conciliation Commission, either Government may require the addition of a third member to the Commission, and failing agreement between the two Governments on the selection of this member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

2. The decision of the majority of the members of the Commission shall be the decision of the Commission and shall be accepted by the parties as definitive and binding.

FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES

Washington, D. C.

IN THE MATTER OF THE CLAIM OF
LOUIS BROUSSE GUILLON
Under the International Claims
Settlement Act of 1949, as amended

Claim No.

STATEMENT OF CLAIM AGAINST THE GOVERNMENT OF FIJI (Name of country)

An original and two copies of this form and each supporting exhibit must be filed. Each document in a foreign language must be accompanied by a verified translation into English. If claimant does not know the answer to a question or the question is not applicable to his claim, claimant should write "Unknown" or "Inapplicable" in the proper space. Answers should be typed or printed. Attach additional sheets as needed.

I. CLAIMANT

1. Name of claimant LOUIS BROUSSE GUILLON
(If at all possible, state full name, including any other names heretofore used. If a corporation or other legal entity, state name, including any other names under which it has functioned.)

2. Address of claimant 2212 M Street, N.W., Washington, D.C.
(If individual, present address; if corporation, other legal entity, or partnership, principal place of business.)

3. If claimant is an individual, state date and place of birth.

..... AUGUST 11, 1933
(Date)

..... Wellesley, Massachusetts
(Place)

4. If claimant is a corporation, state date and place of incorporation.

..... Inapplicable
(Date)

.....
(Place)

Attach a certificate from the appropriate official of the State or other jurisdiction in which the corporation was organized showing the date of incorporation and certifying that the claimant is still in good standing.

5. If claimant is asserting claim in some capacity other than as an individual or corporation, fully describe below the nature or capacity of the claimant.

..... Inapplicable
.....
.....
.....

Attach supporting documents as exhibits No.

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6. *Recapitulation of your loss*

Amount claimed in dollars

Real property \$255,715
 Personal property
 c. Other
 d. Total amount claimed \$255,715

II. QUALIFICATION OF CLAIMANT AS UNITED STATES NATIONAL

7. If claimant is an individual, complete the following: YES
(or NO)

If yes, indicate how nationality was acquired. (Check one)

☒ Birth Dating: 11, 1938 Place: Walla Walla, Washington
☐ Naturalization Date Place
☐ Marriage Date Name of spouse
☐ Through parent(s) Date (Name(s) of parent(s))

Attach exhibit (a) No. 1, evidencing claimant's nationality.8. Has claimant ever lost his United States nationality? NO
(or YES)

9. If claimant is a corporation or other legal entity, complete following:

(a) At all times between 1938 and the presentation of this claim, more than 50% of the outstanding capital stock of all classes or of other beneficial interest in the claimant has been owned, directly or indirectly, by persons who were then United States nationals. (Indicate in blank space the date on which such continuous ownership commenced.)

Attach as exhibit No. 2 a sworn statement by the secretary or other principal officer of the corporation (or other entity).

(b) On the date of loss, the claimant had outstanding shares of capital stock of all classes or other evidence of beneficial interest, which were then held by different persons.

(c) On the date of the presentation of this claim, the claimant had outstanding shares of capital stock of all classes or other evidence of beneficial interest, which were then held by persons.

III. NATURE OF CLAIM

10. The claim originally arose on See Exhibit 2 in favor of
(Date)

as a result of the following action:

(Name of person)

Attach as exhibit No. 3, 4, 5, 6 all documents available to claimant pertaining to the foregoing.

11. Description of property, location at time of loss or damage, and nature of claimant's interest.

See Exhibit 3

12. (a) Except as indicated below, no other person, firm, corporation or other legal entity has or, asserted. nationality since date of loss, has had any interest in the property above described or in the claim. (If there is or has been any such other interest, indicate the names, present addresses, and of all such other interested parties.)

(b) Is the claimant a successor in interest to the person who originally suffered the loss? NO
(Yes or no)

13. Is this claim based upon an interest, direct or indirect, in a corporation or other legal entity which directly suffered the loss with respect to which this claim is asserted, but which is not itself qualified to assert a claim? NO
(Yes or no)

If yes, complete the following: On the date of the loss asserted herein, 25% or more of the outstanding capital stock or other beneficial interest in the _____ (Name of corporation or other entity) was, in the aggregate, owned, directly or indirectly, by United States nationals, as follows: (Indicate names and addresses of such persons, including the claimant, the nature and extent of their respective interests, the total outstanding stock, and the sources of the claimant's information.)

IV. AMOUNT OF CLAIM

14. This claim is asserted for the total amount of \$ 255,715.66 It is computed as follows:
Further proof being compiled and to be submitted at a later date.

Attach as exhibit No. _____ all documents available to claimant evidencing the foregoing, including, if the claim is one relating to property, documents indicating all pertinent insurance and tax appraisals or valuations, mortgage or other lien encumbrances, etc.

15. (a) Apart from this claim, has claimant or any predecessor in interest received or any reason to expect to receive, any benefits, pecuniary or otherwise, on account of the loss resulting from the action for which this claim is filed? (If so, explain.) NO

(b) Has claimant filed any other claim with the Foreign Claims Settlement Commission? NO
(Yes or no)

(c) Has claimant filed or asserted any claim with respect to the subject matter of this claim or any related matter with or against any other agency of the United States Government or any foreign government? NO
(Yes or no)

16. Has the claimant or any predecessor in interest of claimant, ever asserted the loss with respect to which this claim is made, by way of deduction or otherwise, in connection with any tax return heretofore filed by the claimant or any predecessor in interest? Yes

(If such claim has so been asserted, furnish all details below, including when and where such return was filed, the amount of loss so asserted and the extent, if any, to which the loss was so allowed.)

17. Set forth any additional facts pertinent to this claim.

Further proof of certain items herein are being properly compiled and shall be submitted at a later date.

V. GENERAL

These questions must be answered.

18. (a) Has the claimant or any person for whose benefit any amount upon this claim may be voluntarily, knowingly, and without duress given aid to or collaborated with or in any manner served any government hostile to the United States during World War II, or has been convicted of a violation of any provision of chapter 115 of Title 18 of the United States Code, or any other crime involving loyalty to the United States? No

(Yes or no)

(b) If yes, specify Inapplicable

19. Has the claimant agreed to pay to any persons for services rendered on behalf of the claimant in connection with this claim, any amounts aggregating in excess of 10% of the total amount which may be paid to the claimant on account of this claim? (If any such agreement has been made, state details below and attach copies of all pertinent written documents.)

No

20. (a) (In the case of an individual claimant.)

During the period September 1939 to September 1945, inclusive, was the claimant at all times physically present within the territorial limits of continental United States or Alaska? Yes

(Yes or no)

(Specify below all periods of time during which the claimant was not so present, indicating where he was during such periods.)

1939 - January, 1940 - American Legation, Bucharest, Rumania
Summer, 1941 and
Summer, 1945 - American Embassy, Ottawa, Canada

- (b) (In the case of a corporate or other legal entity claimant.)

During the period September 1939 to September 1945, inclusive, were all of the principal officers and other executive heads of the claimant physically present within the territorial limits of continental United States or Alaska? No, applicable

(Yes or no)

(Specify below all periods of time during which any of such persons was not so present, indicating where each of such persons was during such periods.)

No applicable

21. (In the case of an individual claimant.)

The undersigned states that he is the claimant herein; that he has read the foregoing statement of claim and each statement and exhibit attached thereto and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

Dated September 25, 1956.

David R. [Signature]
(Signature (or mark))

If by mark, two witnesses:

Name Thomas P. [Signature] Address 1516 Grand Central Ave. [Signature]

Name Peter [Signature] Address 276 BKA [Signature]

22. (In the case of a corporate or other entity claimant.)

The undersigned states that he is the _____
(Title or office)

of the claimant herein; that he is duly authorized to sign and file this claim on behalf of the claimant; that he has read the foregoing statement of claim and each statement and exhibit attached thereto and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

Dated _____, 195_____

(Name of claimant)

by _____

(Title)

SEAL (if any; if not, so state).

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10.

The claim originally arose beginning in 1947 in favor of the applicant herein, LOUISA BRONSON GUNTHER, as a result of the following facts and actions:

The applicant herein, LOUISA BRONSON GUNTHER, is the widow of the late FRANKLIN MOTT GUNTHER. Mr. Gunther and the applicant herein were married in London, England, on April 28, 1923. Mr. Gunther devoted his lifetime to the diplomatic service of the United States, commencing in 1908 with his appointment as Private Secretary to the United States Ambassador to Japan and culminating with his appointment by the United States as its Envoy Extraordinary and Minister Plenipotentiary to Rumania in 1937 - holding during the intervening years such posts as Counselor of the American Embassy in Rome, Minister Plenipotentiary to Egypt and Ecuador. Annexed hereto as Exhibit 2a is a summary of Mr. Gunther's career, as taken from The National Cyclopedic of American Biography.

In 1937, Mr. Gunther was appointed Envoy Extraordinary and Minister Plenipotentiary of the United States to Rumania. He left the United States with his wife, to assume his new duties with the legation in Bucharest, Rumania. Arriving in Bucharest, Mr. and Mrs. Gunther established a home at the American legation at Elisa Filipescu, Bucharest, Rumania. Thereafter in 1939 they moved to the new home for the legation in Bucharest.

Exhibit "2"

Mr. Gunther was a man of varied interests, especially devoted to the arts in all forms. During his many years of travel to the various parts of the world, both as a representative of the American Government and otherwise, he had developed an intensive knowledge and appreciation of art and was considered an expert in various fields of art. He assembled notable personal collections in such fields as oriental art, porcelains, prints and furniture of various periods and countries. The annexed biography, Exhibit 2a, lists many of the memberships and positions he held.

Quite naturally then, upon his appointment as Minister to Rumania, a position he was to hold until his death, over four years later, he assembled his valuable objects of art and furniture and brought it to his home in Bucharest. Some of the property was shipped by the Security Storage Company, Washington 5, D. C. (see Exhibit 2b)

In December, 1941, while Mr. Gunther still occupied the position of Minister, Rumania declared war on the United States. Shortly thereafter, on December 22, 1941, while awaiting return to the United States, Mr. Gunther died in Bucharest, Rumania. Mrs. Gunther was left in Rumania, now burdened with the great responsibilities which were hitherto borne by her late husband. She had to arrange for the closing of the legation residence, as well as their home in the mountains. She had to arrange to leave the country by a diplomatic train to Lisbon to meet the exchange ship, Drottningholm. As war had already been declared and every American was trying to leave the country, an atmosphere of

mass confusion existed. The American legation was being taken over by the Swiss. Because of the conditions, it was impossible to take anything but a few personal belongings. Some of Mrs. Gunther's property was hurriedly packed and stored at the legation chancery. The Chinese paintings and some of the Rumanian paintings were, at the time, on exhibition in the Toma Stelian Museum in Bucharest, and they offered to hold these paintings until such time as Mrs. Gunther could return. The balance of the property was held by various Rumanian friends for Mrs. Gunther until she could return. Mrs. Gunther left Rumania by diplomatic train at the end of January, 1942.

After arrival in the United States, Mrs. Gunther proceeded to clear her husband's estate. Mr. Gunther had executed a Last Will and Testament on June 4, 1937, in Washington, D. C., under the terms of which he left all his personal effects, jewelry, clothing, objects of art, household furniture and other articles of domestic and personal use, amongst other things, to his wife, the applicant herein, and appointing Mr. Gunther as sole executrix under the Will (see Exhibit 2c annexed hereto). The will was offered for probate in the County Court, Leon County, Florida, and was admitted to Probate on March 7, 1942.

In November, 1945, the war having ended, Mrs. Gunther returned to Rumania by military plane. The country had already been occupied and dominated by the Russian government and the local communist followers. There ensued the fierce struggle between the liberal democratic element and

the communist sympathizers, led by Moscow trained leaders and supported by the Soviet forces then occupying the country. The subsequent capture of the Rumanian government by the Communists is now history.

In the meantime, the United States took back the Chancery and established its diplomatic mission therein. The mission advised Mrs. Gunther that it needed the space then occupied by Mrs. Gunther's cases, etc. Having no alternative, Mrs. Gunther added these to the property being kindly stored for her by her Rumanian friends. The pictures were still at the Museum. Her car, which she had retrieved, was taken from her at gunpoint and later found smashed beyond repair. It was impossible to ship any of her property back to the United States. One of her friends, a former member of the legation who was then in Bucharest on military duty, attempted to send certain rugs he owned back to the United States and the only ones that ever arrived had their entire centers cut out.

In January, 1947, Mrs. Gunther was advised by cable that her mother had suffered a stroke and was in a critical condition. She left at once by military plane and returned to the United States. Because of the fact that the Allied Control Commission was still in Bucharest and it was not generally suspected that the country would be thereafter totally abandoned to the Communists, she felt that she would be able to return at a later date, when a more stable atmosphere developed, and then retrieve her belong-

ings. Such was never the case and she has not returned to Rumania to date.

Shortly after her departure, the systematic liquidation of the upper and middle classes began. Imprisonment, deportation and seizure of homes and belongings were all effectively employed by the communist government in their mass destruction of the opposition. This was especially true of the so-called "upper and middle classes" who were normally amongst the strongest opponents to the communist regime. Their homes, furnishings, belongings and any property found in their possession was confiscated. Sometimes this was accomplished under the guise of a decree. If no decree or edict was in existence, one was hurriedly declared to suit the situation. And indeed, in most instances, the systematic confiscation and looting was done without any pretense of legal authority and by the mere employment of force by the defacto government. Examples of the various so-called decrees passed by the Rumanian government to "legalize" their numerous confiscations can be found in the following:

(1) Monitorul Oficial #92, Law No. 312, dated April 24, 1945, providing for the confiscation of property of political enemies.

(2) Muletinul Oficial #44, Decision No. 165, dated February 23, 1948 - providing for the confiscation of property of certain Rumanian nationals who were deprived of their citizenship.

(3) Buletinul Oficial #154, Decree No. 125, dated July 7, 1948 - providing for the confiscation of property of Rumanians who have lost citizenship.

(4) Buletinul Oficial #196, Decree No. 212, dated August 25, 1948 - providing for the confiscation of property of persons convicted of certain crimes against the State.

(5) Buletinul Oficial #25, Decree No. 183, dated April 30, 1949 - providing for confiscation of property of persons convicted of certain offences.

(6) Buletinul Oficial #67, Decree No. 192, dated August 5, 1950 - providing for confiscation of property in cases of certain crimes.

(7) Buletinul Oficial #68, Decree No. 16, dated August 12, 1950 - providing for confiscation of property of persons convicted of certain political crimes.

Perhaps the strongest applicable decree to the situation herein is Buletinul Oficial No. 81, Decree No. 111, dated July 27, 1951. Significant portions of that decree are quoted herein at length.

"Decree No. 111

regarding the regulation of goods of all kinds to be confiscated, or already confiscated, without inheritors or 'without a master', as well as goods which no longer serve government agencies.

"Sec. 1. The goods which are under the provisions of this decree are the following:

* * * * *

"a) Goods 'without a master' as well as those considered abandoned by the effect of certain laws or decrees.

Considered as goods 'without a master' are goods of all kinds abandoned for one year by their owners--

known or unknown---as well as goods found and remitted to the Militia units, which have not been claimed by their owner in three months' time from the remittance.

* * * * *

"Sec. 3. The valorization of these goods will be done by selling them to institutions, enterprises and state economic organization, or to cooperatives and collective agricultural cooperatives, as well as to private persons. The Ministry of Finance can also give them gratis to some categories of beneficiaries."

It is therefore quite apparent that the applicant's property, as enumerated herein, has been confiscated by the Rumanian government. Certainly, the so-called "legal basis" for such a confiscation existed in any of the innumerable decrees conveniently dictated by the Rumanian government to suit its needs at any given instance. Reference need only be made to the edict enumerated in Buletinul Oficial No. 61, Decree No. 111, above cited in detail. Under the provisions of that decree Mrs. Gunther's goods would be considered as "goods without a master" (the property having been left by Mrs. Gunther either in 1941 or in 1947 with friends in Bucharest) and, as such, would be subject to confiscation without compensation. Because of the refusal of the Rumanian government to give American citizens even token access to its country, the exact dates of confiscation of the applicant's property cannot be ascertained. No channels of communication are available to the applicant herein through which any information can be gleaned. The property of claimant was left with various persons, all of whom were in opposition to the regime. Unfortunately, opposition to a communistic dictatorship does not thrive long, and today

after eleven years of subjugation, it can be safely assumed that the criminal confiscation without compensation has been completed.

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON 25, D.C.

OFFICIAL BUSINESS

B. B. Coyne, Esquire
927 - 15th Street N. W.
Washington, D. C.

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FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON 25, D. C.

811

In the Matter of the Claim of

ROBERT H. HARRIS, CLAIMANT
2512 Y Street, N. W.
Washington, D. C.

Claim No. 2511-30,111

Decision No. 11-461

Against the Government of Rwanda
Under the International Claims Settlement
Act of 1949, as amended

cc - 10-1-1959

Counsel for Claimant:

Lawrence D. Brown, Esquire
100 Cherry-Nebraska
181 Fifth Avenue
New York 22, New York

THE DECISION

The Commission formed its proposed Recommendation on July 9, 1958, a copy of which was duly served upon the claimant.

After consideration having been given to the original of the claim, and to the evidence and a hearing was held on the hearing on April 15, 1959, it is

CONCLUDED that the findings set forth in the Recommendation be reversed as follows:

The Commission finds that Robert Harris certain personal property which was taken without compensation by the Government of Rwanda during 1954. The Commission further finds that the value of the property taken was \$103,415.00 and concludes that claimant is en-

titles to an island under Section 303(a) of the Act.

ARTICLE

Payment to the promoters of the International

Chain of Payment Act of 1949, as amended, in award is

hereby made to LOUISA MONTANA GUTHRIE in the amount of One Hundred Three Thousand Four Hundred Forty-Five Dollars (\$103,445.00) plus interest earned at the rate of 4 1/2 per annum from July 1, 1947 to August 9, 1950, the effective date of the Act, in the sum of Fifty Thousand Three Hundred Eight Dollars and Seventy-Four Cents (\$50,308.74).

Payment of any part of this award shall not be construed to have divested the claimant, herein, or the Government of the United States on her behalf, of any rights against the Government of Indonesia for the unpaid balance of the claim, if any.

General notice of the proposed Decision having been given by posting for thirty days, it is

ORDERED that the Proposed Decision, as amended herein, be and is hereby entered as the final Decision on this claim, and it is further

ORDERED that the award granted herein be certified to the Secretary of the Treasury.

Issued at Washington, D. C.

JUN 8 1959

CERTIFICATION

This is a true and correct copy of the decision of the Commission which was entered as the final decision on JUNE 8 1959

Thomas Thompson
Clerk of the Commission

Paul H. R. Smith
Commissioner

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from the original

17

THE COURT: That is Petitioner's Exhibit 13.

(Petitioner's Exhibit No. 13
was marked for identification
and received in evidence.)

18

- DIRECT testimony
- (John A. Gunther, former Ambassador)
BY MR. COYNE:

A Mr. Hull asked Mr. Gunther to take everything
necessary with him.

Mr. Hull asked him to take furniture and things
and properly furnish a Legation residence ---

MR. CARROLL: May I again interpose my objection?

THE COURT: Objection overruled.

THE WITNESS: ---- as it was an important listening
post at that moment with the state of Europe and the Germans
at that time were making a big play for Rumania and it was
important what we did.

21

Q Were you in charge of the entertainment?

A Oh, yes.

Q You were?

A Oh, yes. Well we both were, we did everything
together. He did the invitations, I did the organizing.
He knew who he wanted to invite because that was a political
thing, that was all political entertaining. They were
political people in the Government.

In fact, the day that the Russians walked into the Bessarabia, he was giving a big dinner for the prime minister and I must say it somewhat dislocated the dinner.

Q What buildings did the United States have outside of your residence?

A They had the chancellery, that is where the business is done. They had the chancellery, that was taken by the American Government and it was furnished. Actually the room of the Minister, he put his own things in, that was his own wish. The Legation chancellery was taken by the Government
22 . and furnished by the Government. We were responsible for the residence.

Q Who paid for the transfer of the goods from Washington to Bucharest?

A The State Department paid for it with the understanding or the agreement, actually, that they would bring it back. Actually, I think it was in 1948, he had some things in England which were finally sent to Dublin, the Embassy there, and the State Department paid for bringing those back, that was after his death, of course; because it was diplomatic property.

23 Q What happened to the U. S. Chancellery during the War?

A That was put in the hands of the Swiss Legation. The Swiss were on good terms on all sides and they represented

us and protected our Legation during the War. They had a Swiss official who stayed in the chancellery.

I went back at the end of November 1945, which was the soonest that it could be arranged. I went back by military plane. I arrived at a very unfortunate moment, it was the moment of some representations for the birthday of the king when people were murdered, arrested and whatnot. My stuff was safely at the Legation and the other places where I had left them but at that time it was either the last days of '45 or first days of '46. It was early in 1946 the Legation requested my stuff be put out of the Legation because they needed the room for files.

Well, there was nothing I could do about that, it was against my desire and certainly not with my approval or willingness.

Q Was all the property still there when you returned?

A All the property was still there, I did not unpack anything but all the cases, all the barrels, all the stuff was still there.

All the stuff was put out and I had no possibility of doing anything except giving it to the various people who were only too willing, they were friends of the West, took charge. I divided the stuff up, I didn't do it myself, I simply told them to send certain parts to this and

certain parts to that and hoped I would be able to do something about it.

Now, I looked into the question in 1946 as to what could be done. It was absolutely -- this is the beginning of 1946 -- it was absolutely impossible to send such a quantity of stuff to the United States.

The chaos was something incredible. Armed bands were attacking houses, people, stealing everything in sight. Trains were stopped, stuff was grabbed -- it was an appalling situation.

I, at the advice of friends and also at the advice of Mr. Burton Barry, who was our minister then, they called it another name, it was not yet a Legation, it was a diplomatic mission, I believe. He was the head of it and afterwards became minister. He told me not to, on any account, try to send anything.

He had some rugs. He collected coins, all of which I believe he finally took to Turkey. I think that is where he went after, but he said on no account try to send it. Several people had lost stuff and it was just crazy. There was no object in my doing that as there was a good chance I would get it because there would be a peace treaty. Then

Then I wanted to leave immediately in 1946 but Mr. Barry, who, as minister, was very interested politically, he wanted to know what was going on in the royal circles

with the king and queen, queen mother. I was a great friend of the queen mother and I went up to their place in the country every weekend.

Mr. Barry said, would I please continue as long as I remained in Rumania because it was very important to him that I get any information that I could up at the palace. I would then go back and report everything to Mr. Barry. Mr. Barry said that was extremely useful and he hoped I would stay as long as possible and continue this work.

I would probably have stayed longer and continued it except my mother had a stroke and I was called back immediately and I left.

27

BY MR. COYNE:

Q Do you know how many places this property was referred to after you left?

A About four, I think.

Q In general, what type of people were they?

A They were all what they call bourgeois. People with houses, a little money, people who had been in the Government, all political people, all people of means, some in the different companies and some people of leisure. They were all friends of the West and all, thus, were eliminated ruthlessly by the Communists, including those that had my things.

Q After your mother became ill, what happened?

A Then I took a plane back to Paris, you couldn't get out any other way. I took a plane to Paris and there I took a boat and came back. My mother died at the end of the year. Of course, I had to leave my husband's body, there was no question of doing anything about that, either.

Q Were the Russians throughout the country?

A All throughout the country, the port of Constanta was probably the worst, that is where the boats came in, the Lend Lease and Rumanian boats, under Russians, of course, taken by the Russians, that is where the Russians sent all
28 this stuff to, Constanta.

Q What was the attitude of the Russians towards Americans?

A Complete and appalling disdain. Among other things they tore down our flag off a building and tramped on it. We did nothing. There was a so-called Control Commission which was three partite but the Russians made it very clear that the American, British and French -- no, I don't think there were any French -- the British, Americans and Russians, the Russians made it clear the British were there only to look on, they had nothing to say and better just keep quiet, which they had to do. They made a few protests to which no answer was ever given.

Things were taken from the Americans and British with just as great enthusiasm and ease as from the Rumanians.

Q Do you know what happened to your property after you left Rumania?

A After I left Rumania, as far as I know, several people, one of them, Madam Nicotta, who lives here, saw armed bands in trucks ----

MR. CARROLL: Objection.

THE COURT: Objection sustained.

MR. COYNE: We will have that witness here.

THE WITNESS: She saw the stuff being taken anyhow.

29 They were all arrested, these people, as there was no law or order of any sort at that time. Anybody could go in and take anything they liked. My stuff obviously disappeared in that way.

Q Mrs. Farcasanu, what happened after you returned from Bucharest in ----

MR. CARROLL: Excuse me, Your Honor. The witness answered a question just prior to our recess in which she stated her assumption and I would move that be stricken from the record.

THE COURT: I will take it under advisement, I don't remember what it was. Go ahead, Mr. Coyne.

BY MR. COYNE:

Q What happened in 1947 after you returned from Bucharest?

A I talked to the State Department as to what

should be done, whether I should do anything or not and my brother-in-law was, when I was in Rumania, he was minister in Bulgaria. After that he was minister in Denmark, after that he was ambassador in Canada and after that he was at the U.N.

30

At that time, he was ambassador in Canada.

THE COURT: What was his name?

A THE WITNESS: Ray Atherton, his wife Maud is my sister. He was in the Department and I talked to him about it. He knew my stuff and all that. I also talked to the people at the Bureau there that have to deal with the Rumanian thing.

My brother-in-law said, "The Rumanian assets, \$22 million, or some very large sum, were blocked in 1940 and are still blocked and will be used to pay people who have lost their things, that is, if the peace treaty which was taking place in 1947 with Rumania, and Rumania promised to pay all foreigners who lost their goods and whatever it might be, so either that will be paid by the Rumanian Government through the peace treaty or, therefore, you will get your stuff out because of there being the peace treaty.

"They will allow you to bring out your stuff. All the money that has been ear-marked, the Rumanian funds will pay the people, so you will get a redress in one way or another"

He said, "You don't have to do anything." The only thing," he said, "is don't make any fuss about it, don't try and take" -----

Q A loss at that time, you mean?

31 A Yes, the thing is, in short, don't do anything of that sort. There was no question of my doing anything of that sort because the stuff could not be insured because of the War conditions, so it had never been insured.

He said, "Just wait, either you will get it back because of the agreements in the peace treaty or you will get it back through the Rumanian blocked funds."

Q Did you ever get the things back pursuant to the peace treaty?

A No, the peace treaty was signed and the Rumanian Government went back on every single thing signed in the peace treaty.

About that time it was Mr. Dean Acheson who was in the Hague for the U.N. making representations against the Rumanian Government for not paying any attention to the signed peace treaty and not fulfilling their obligations.

Q What happened after that, when you didn't get the property back?

A I just waited because he said, "Just wait and you will hear in time what decision they will come to."

The first thing I knew was a message from the State

Department, from him actually, saying -- and there was an official thing from the State Department -- to make your list and your claim because there would be a Claims Commission to handout and divide the funds.

Q Do you have any idea, approximately, when you
32 received that communication?

A It must have been in 1956 or 1957.

Q Are you referring to the Foreign Claims Settlement Commission?

A Yes. That is the first time they told me to do anything. They told me to wait and I would get it one way or another. Obviously, the Romanians were not fulfilling any of their agreements.

In fact, we sent out a man who stayed there two years trying to get them to fulfill any agreement and they wouldn't. Dean Acheson was protesting before all the International bodies. Nothing was done and the only thing that remained was the Claims Commission and the using of that money, which was a great deal, and we all thought it would be sufficient to pay, especially officials.

After all, one isn't all you life a diplomatic officer for pleasure. You are paid a decent sum, what you would get in any other business if you were not very high up in it, I think it was about \$7,000 to \$10,000 then.

MR. CARROLL: Objection, Your Honor.

THE COURT: Objection sustained.

BY MR. COYNE:

Q Have you ever received any of the property which was taken in Rumania, Mrs. Farcasanu?

A None.

* * *

34 Q You left Rumania for the last time early in 1947?

A Yes.

Q And you never returned?

A That is right.

Q You do not know of your own knowledge what happened to the property after 1947?

A Not of my own knowledge.

Q At 1947 the property was where you directed it to go?

A Yes, I left in January of 1947.

Q Do you know, of your own knowledge, whether any war loss was claimed with respect to this property with respect to your returns for the years 1941 or 1942?

A None.

* * *

39 Q After you returned to the United States in 1947, did you ever request the State Department to return your property to you?

A We talked about that.

Q Who is "we?"

A I and the State Department.

Q Who at the State Department?

A I can't remember who I was talking to then. We talked about that and they said they would make an effort to see if any of my things existed still. I said, okay. I knew personally from what I had heard that they didn't. I had no objection to their looking and I hoped they would find something.

Q When was this?

A 1948.

Q You say in 1948 you knew none of your property was left?

40 A Oh, yes, I had heard that from Madam Ricotta, who wrote me and other people knew it also.

Q You never sent anybody over there yourself to look to see whether your property was available?

A No, I could not.

49

ELENA BRATIANU RICOTTA

THE WITNESS: Elena Bratianu Ricotta, 2801

Quebec Street, N. W.,

DIRECT EXAMINATION

BY MR. COYNE:

Q Are you a United States citizen?

A Yes, I am.

Q How long have you been a citizen?

A Three years.

Q Where were you born?

A In Bucharest, Rumania.

Q Were you in Bucharest, Rumania in 1937?

A I was.

Q At that time, did you make acquaintance of Mr.

50 and Mrs. Franklin H. Gunther?

A I did.

Q Under what circumstances?

A Just personal friends, I met them through friends and we were friends.

Q Did you see them at the American Legation residence at any time?

A Very often.

THE COURT: As I recall the Bratianu family is quite prominent in Rumania and I think one of the family was prime minister at one time.

THE WITNESS: That is right, my uncle.

THE COURT: Proceed, Mr. Coyne.

BY MR. COYNE:

Q Now, did you become acquainted with the furnishings in the residence of the American Legation?

A Yes, I was there very often.

Q Were you in Rumania during World War II?

A I left after the death of the minister with Mrs.

Gunther. I came here in the States in early '42. I stayed for a year then I enlisted in the Free French Army.

THE COURT: You what?

THE WITNESS: I enlisted as a nurse in the Free French Army and was shipped to North Africa and served in the Free French Army for the duration and in early 1946 I was
51 discharged and went back to Rumania to see my family.

Q After you went back to Rumania in early 1946, did you see Mrs. Franklin Gunther at that time?

A She was there, yes, for a visit. I stayed there from early '46 until the Fall of '47.

Q In Bucharest?

A Yes, that is right, in Bucharest.

A When I was there in 1947, I was called by some friends in the place where she had some things, and told that some Communist trucks were coming there to take their things, their belongings and also Mrs. Gunther's things. I went to see and I recognized some of the pieces.

There was this Italian furniture. I recognized some Italian tables and chairs, and big crates with her name with silver and china in the crates. They took the whole
52 crates and her name was on the crates.

Q We appreciate you cannot mention any names but do you know how many places you saw furniture being removed?

A I saw two places.

Q When did that occur?

A Well, it first occurred in '47, that was true, but in the beginning just before I left, it was in the Fall of 1947 because I left the end of October and just two weeks before, that was the last time, the last looting.

Q Were you familiar with the looting that was going on in Bucharest?

A Sure I was because all the people I knew were looted. I lost everything I had.

2/16/67

SIMON KOD

23

DIRECT EXAMINATION

Q Did there come a time say in 1937 or 1938 when you came to know Mr. Franklin H. Gantner and his wife?

A 1938?

Q Where did you make the acquaintance?

24

A He was assigned to the Legation in Bucharest, Minister to Bucharest.

Q You were working ---

A At the American Legation.

Q Did you ever visit at the Gantners'?

A Vacations, when we had these various holidays, all

the personnel were invited to the Gunther residence.

Q Did you ever have occasion to consider how the legation was furnished?

A Oh, yes, many times.

Q State to the Court in what manner it was furnished, what your opinion was?

A Nicely furnished.

Q Nicely?

A Very nice.

Q Would you say it was fully furnished?

A It was fully furnished.

26 Q Do you know what disposition was made of the articles which were in the American Consulate residence?

A Everything was turned over to the Swiss Embassy as custodian for American property left behind in Rumania. Mrs. Gunther had these crates and personal belongings which we brought over to the Legation and put them in an air raid shelter for safe keeping, which articles were there after we went back to Rumania the latter part of 1944. They were still there.

Q In the same condition as when you left?

A Yes, the same condition.

27 Q Did there come a time when some disposition was made of Mrs. Gunther's property, which was left?

A Shortly after Mrs. Gunther arrived, sometime in 1946, I was approached by one of the officials because they thought Bucharest would be bombed again by the Germans, if I could contact Mrs. Gunther, advise her to have her belongings from the Legation moved somewhere else so the air raid shelter could be used, if needed.

Q In other words, the air raid shelter was necessary for purposes of use?

A Yes.

Q It was in the Legation at that time?

28

A It was only a Mission. The Legation, I think they considered years later. While I was still in Rumania, it was only a Mission.

Q What happened to Mrs. Gunther's property?

A I contacted Mrs. Gunther. She gave me a number of places where I should have the things delivered which I did, according to her instructions.

Q Did there come a time when you became aware that any of the property was disposed of against Mrs. Gunther's wishes or what happened to the property after that?

A In one particular case, I remember I was told by somebody that they were at a certain place, I went around to see what was going on, I saw this truck there. They were loading up crates, boxes, what-not by whoever lived there.

Q Do you know whether any of Mrs. Gunther's goods were included?

A I saw a number of crates that had been at the Legation.

Q Do you know who it was engaged in taking these articles?

A I know it wasn't military. I don't know.

THE COURT: What was that?

THE WITNESS: It was not military instructions.

By Mr. Coyne:

Q How were these people dressed taking the articles?

29

A Civilian clothes.

Q Do you know what happened to the articles after that?

A No.

Q You never saw them again?

A No.

Q How long did you remain in Bucharest?

A I was in Bucharest until February 1947. Then I left.

42

*DIRECT EXAMINATION
(Ben Cu Niclescu)*

The old Constitution, I know, provided for no confiscation under any form under the law.

MICHAEL FARCISSANU

60

DIRECT EXAMINATION - resumed

Q Do you have some documents relating to the constitution that went into effect in Rumania?

A I took some copies from the Library of Congress, the first is the Constitution of 1923 and the second is the subsequent Constitution of April 1948. In the democratic constitution, which was the basis of any Government up to April 1948, there are some relevant aspects under Rights of Rumanians, Article 11, with regard to individual freedom.

3/29/67

LUISE GUNTHER FARCISSANU

CROSS EXAMINATION

116

Q Did there come a time when the State Department informed you that the house of Mr. R in which you had some property was being requisitioned by the Rumanian government?

A Only what was in these things.

Q That is true then? That they did inform you?

A I don't remember, frankly, whether they did or not.

Q You don't remember whether they did or not?

A They probably did. They should have, but I don't know.

Q Did they ask you -- let me show you Item 4 of

117

of Exhibit No. J and ask you if you recall receiving that letter?

A I don't remember that letter.

Q You do not recall receiving that letter?

A I don't know it, no. They told me, but I don't remember receiving any letter.

Q Do you remember in a car going to the State Department?

A I went to the State Department on the advice of my brother-in-law.

Q Going to the State Department for the express purpose of discussing with them what was to be done with respect to the property?

A To discuss with them the fact that I had the property. As my brother-in-law said, I must make a declaration. Otherwise, when there came the question of the peace or any repayment from Rumania, if I had not made a declaration ---

Q Let me interrupt and ---

A A declaration. I wish to state what I am saying. If I did not make a declaration, I could not then go to the government and ask for payment. You can't ask for payment if you haven't requested your things first, because they just don't believe you.

Q Now back to the question. With respect to the property in Mr. R's house, did you go to the State Department to discuss the disposition of that property?

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118

A Not the disposition because I knew it was not there I had been told it was not there. I did not do that.

Q You never went to the State Department?

A I certainly went to the State Department.

Q To discuss the disposition?

A No. To discuss the fact that I had lost these things, that I had had these things in Rumania. They said if we can find them. I said, okay, if you can find them or any of them.

let me know. They never let me know that they found anything.

Q I read to you from Item 8 of Exhibit No. J. It says that on October 28th, 1948, Mrs. Franklin M. Gunther, widow of our former minister to Rumania, left -- forwarding through the pouch the attached letter, and ---

A They generally neglected to put them in the pouch and got the people in trouble.

MR. CARROLL: Robert C. -- I move that that be stricken.

THE COURT: That will go out.

THE WITNESS: If you can make heads or tails with anything that the State Department does, you are cleverer than I am, Mr. Carroll.

BY MR. CARROLL:

Q I draw your attention to the language of Item 14 under Exhibit No. J, which states that Mrs. Gunther called the Department on January 13th, 1949 and requested that the legation

119 be assured of her confidence in Madam N and of her wish that property in Madam N's custody remain there without any effort which might result in complications with Madam N with the local authorities. Did you make such a call to the State Department?

MR. COYNE: I object to that. There is no showing that the person appearing at that meeting was Madam N. There is no sworn statement that usually appears, someone who identifies on this record, that this Mr. Page ever knew Madam N and could identify her.

THE COURT: Objection overruled.

BY MR. CARROLL:

Q Is that true, that you did appear at the State Department?

A I have no recollection.

Q You don't recall?

A I certainly do not.

Q You never appeared at the State Department?

A I never -- certainly. But what I told you, I never wanted to talk about Madam N because I know them, and they knew this ---

Q Did you say this to the State Department?

A I really couldn't tell you.

Q You don't know whether you stated it to the State Department?

120

A No, I really couldn't tell you.

Q Then you might have said to the State Department that you wished the property in Madam N's custody that she had there remain?

A I certainly did not wish that because I did not know she had any property.

Q Let me ask you again. Did you say anything to the State Department?

A I did not.

Q Did you say anything like that to the State Department?

MR. COYNE: I don't think there is any proof of that that there is any property belonging to the petitioners there.

THE COURT: He can ask the question. I think you have asked it a couple of times. The witness has denied it or couldn't recollect.

THE WITNESS: I did not say anything about property in Madam N's because there was no property in Madam N's. There never had been. It had been taken in 1947, the end of 1947.

BY MR. CARROLL:

Q It is untrue, then, where this document states that you said that you wished the property in Madam N's custody to remain there? That statement is untrue?

A I never said any such thing.

Q It is untrue?

A Absolutely untrue.

Q Let me read further with item J. It says that with respect to the furnishings in the R house, Mrs. Gunther is
121 satisfied to have the items remain where they are for the use of the British ladies.

A That is a complete and absolute lie.

MR. COYNE: Objection.

THE COURT: Objection overruled. The witness denies that she ever made any such statement.

BY MR. CARROLL:

Q In other words, you made no such statement?

A I certainly did not. In 1949? You are crazy.

Q In reading further in Item 14 under Exhibit No. J, it says that she is in concurrence with the suggestion that an inventory of these items be attached to the lease if this can be accomplished without any risk of adverse results to the individuals concerned.

A What date is that?

Q The date stated in the communication is January 13, 1949. I ask you ---

A (Laughter.)

THE COURT: Just answer the question.

BY MR. CARROLL:

Q Did you indicate your concurrence?

A I certainly did not. I certainly did not. When the house -- none of my stuff had ever been in the house except

in the locked room, which had then been stolen.

MR. CARROLL: I move that that be stricken, Your Honor.

122 MR. COYNE: She has already testified to that.

THE WITNESS: I have already testified to that.

THE COURT: Motion overruled. Are there any other questions?

THE WITNESS: I have already testified to that.

BY MR. CARROLL:

Q I read further from Item 14, Exhibit No. 7 that Mrs. Gunther suggested that Madam N's opinion might be sought on this point.

A On what point?

Q Whether or not -- well, presumably the preceding sentence, which I will reread, that she is in concurrence that a suggestion that an inventory of these items be attached to the lease if this can be accomplished without adverse results to the individuals concerned.

Now, the sentence concerning which I am going to ask you a question, "Mrs. Gunther suggested that Madam N's opinion might be sought on this point." Did you make such a suggestion?

A No.

Q You did not. Would you answer that for the record, please?

A I certainly did not. The last thing I wanted was

the State Department to get mixed up with anybody in Rumania because that meant they would be arrested or shot on sight.

123 Q You did discuss with the State Department the protection of your property in Rumania?

A I said if they could find any property of mine in Rumania, they could report it to me.

Q You wanted them to look for your property?

A No. I told them they better not interfere in any way. I was making the request, and I didn't want them to do it.

Q What did you request them to do?

A To request to say that I had lost the property and that I was making a protest to be used later. This was entirely on the advice of my brother-in-law, Ray.

Q That answers that question. My next question is did you request them to look for the property?

A No.

Q You did not?

A No.

Q Did you request them to take any action if they would find the property?

A No. Definitely not.

Q You never asked the State Department to look for the property?

A No. The one thing I didn't want was to have the

State Department to get mixed up in it and get any more people shot or put in prison, which they had been doing.

124 Mrs. Nebokof being one of them. Mrs. Nebokof. I didn't want any American to get mixed up in in that Communist business because the very thing to just look at an American or to speak to an American meant that you lost your liberty. I hope to God you will never know really anything about Communism first hand, Mr. Carroll, because you certainly don't.

Q At that time or at any other time, then is it your testimony that you never asked the State Department to look for your goods in Romania? Would you answer that for the record, please?

● ● ●

— *Journal of the American Medical Association*, 1990; 263: 1025-1028

[illegible]

ORDERED that the findings set forth in the foregoing Certificate be published as follows:

The Commission further states that the value of the property taken for public purposes, and the compensation therefor, was \$103,445.00 and consists of the following: is entitled to be paid \$103,445.00. 303(2)

222

First lot of the portions of the Trust made in
1949, a sum of \$100,000, and the interest
hereby made to LOUISIANA in the amount of One Hundred
Three Thousand Four Hundred Forty-Five Dollars (\$103,450.00) plus
interest thereon to the date of the hearing, to-wit: August 9,
1953, the officially set off sum of One Hundred and
Fifty Thousand Three Hundred Eighty Dollars and Sixty-Four Cents
(\$150,384.74).

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Report of any part of the said claim, or the Commission
to have directed the claimant to pay, on the Government of the
United States on his behalf, of any right to the said claimant
of revenue for the unpaid balance of the claim, if any.

General notice of the Proposed Decision, made on the 1st day
by posting for thirty days, is as follows:

ORDERED that the Proposed Decision, as the same is, is
and is hereby entered as the Final Decision on the claim; and
it is further

ORDERED that the same shall be certified to the
Secretary of the Treasury.

Done at Washington, D. C.

JUN 8 1959

CERTIFICATION

is is a true and correct copy of the decision
of the Commission, which was entered as the final
decision on June 8, 1959

Thomas H. Johnson

Clerk of the Commission

William H. ...
Robert L. ...
Robert L. ...

Commissioner

[Caption Omitted in Printing]

* * *

DECISION

Pursuant to the opinion of the Court filed September 17, 1968, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1959 in the amount of \$42,075.47.

(Signed) JOHN W. KEEN

Judge.

Entered: JAN 15 1969

* * * * *

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

Bartholomew B. Coyne
Counsel for Petitioner

(Signed) LESTER R. URETZ

GJR

LESTER R. URETZ

Chief Counsel

Internal Revenue Service

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DOCKET ROOM

TAX COURT
OF THE UNITED STATES
FILED

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TAX COURT
OF THE
UNITED STATES

LOUISE GUNTHER PARCASSANO

PETITIONER

V.

DOCKET NO. 3533-62

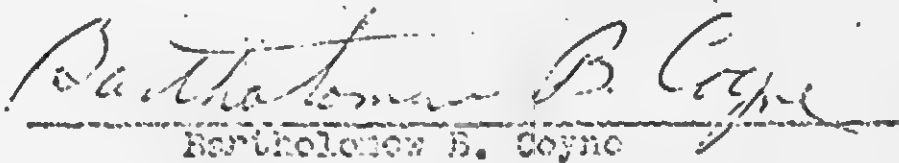
COMMISSIONER OF INTERNAL

REVENUE

RESPONDENT

NOTICE OF APPEAL

Notice is hereby given that Louise Gunther Parcassano hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the decision of this court entered in the above captioned proceeding on the 15th day of January, 1969.



Bartholomew B. Coyne
Room 1006
927 15th Street, N. W.
Washington, D. C. 20005

Attorney for Louise Gunther
Parcassano

AVAILABLE

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TAX COURT OF THE UNITED STATES

LOUISA B. GUNTHER

Plaintiff

v.

Docket No. 3533-62

COMMISSIONER OF INTERNAL
REVENUE

Defendant

SCHEDULE OF PROPERTY LOSSES OF
PLAINTIFF LOUISA B. GUNTHER

<u>Number</u>	<u>Cost or Value</u>	<u>Description</u>
1	\$ 5,000	Large Chinese Painting, portrait of a Deity (Sung Period) bought in London by F.M.G. in 1913.
2	6,000	Large Italian Primitive, 15th Century (Maestro di Bambino Vispo).
3	7,500	Large Italian Primitive, 15th Century (Paolo Ucello) Cassone Panel.
4	3,500	Italian Primitive, early 15th Century (Sano di Pietro), date: 1406-1481.
6	7,500	Italian Primitive, 15th Century.
The above Italian Paintings were all bought by me in Italy between 1921 and 1924 - Appraised in 1959 by French and Co., New York, for \$7,200 less than I paid. French told me prices for Renaissance paintings are lower now.		
5	5,000	Small Italian Primitive, 15th Century (School of Perugino) bought by me in Italy in 1924.
7	5,500	Large French Painting, 18th Century (Nicholas Poussin).
8	1,532	French Painting, 19th Century (N. Diaz) Barbizon School.

- 9 4,095 French Painting, 19th Century (Monticelli)
Barbizon School.

The last two were bought by Franklin Gunther Senior at a sale, King Street, London, on July 2nd, 1920, and were mentioned in the Comptroller of Sept. 1920. They were both given to me in 1922. No. 7 was also bought by Franklin Gunther Senior and given to me in 1922.

- 10 \$ 4,000 Six Early Chinese roll Paintings (Ming period)
bought by F.M.G. in France between 1914-18.
- 11 1,750 Chinese Painting of an Eagle (Ming period) bought
bought by F.M.G. in France between 1914-18.
- 12 1,750 Chinese Painting of a Lady (Ming period) bought
by F.M.G. in France between 1914-18.
- 13 4,870 Japanese Prints bought by me at the Kawaura Sale
in New York in 1925.
- 14 10,442 Japanese Prints bought by me at the A. Davison
Ficke Sale and the F. Lloyd Wright Sale in 1927.
I have the Catalogues of these Sales with the items
I bought marked and the prices paid.
- 15 6,950 Three Portraits and one Still Life by Steonescu
bought by me between 1938-1942; in Romania. I
have declaration by him of price paid.
- 16 3,500 Two Paintings by Patrascu, bought by me in Romania
at an Exhibition of the artist's works in 1938.
- 17 2,500 Painting by Steriade, bought by me at Exhibition
of artists works in 1939.
- 18 2,500 Painting by Grigoresco, 19th Century, bought by me
in Romania from dealer in 1938.
- 19 200 Two Paintings by Yser. Bought by F.M.G. in Romania
in 1939.
- 20 100 Painting by Isacei, Still Life. Bought by F.M.G.
in Romania in 1940.
- 21 100 Painting, landscape, by Isacei. Bought by F.M.G.
in Romania in 1940.

- 22 100 Drawing by Satriani, bought by F.M.G. in Romania from exhibitor in 1940.
- 23 \$ 100 Landscape by Ghasta, bought from the exhibitor by F.M.G. in Romania in 1941.
- 24 100 Landscape by Suteulescu, bought by F.M.G. in Romania from exhibitor in 1941.
- 25 800 Two Drawings by Steriade. Bought by me in 1940, at an exhibition of the artist's works in Romania.
- 26 800 Two Drawings by Popescu. Bought by me in 1939, in Romania at an exhibition of the artist's work.
- 27 1,000 Drawing by Grigorescu, 19th Century. Bought by me in Romania from dealer in 1938.
- 28 200 Etchings by Zorn, bought by F.M.G. in Norway in 1914.
- 29 13,365 Two hundred and two cases of Wine and Liquor, bought by F.M.G. from dealers at various times. Appraisal by Ace Beverage Co., Washington, D. C.
- 30 4,000 Three Trunks of F.M.G.'s personal clothes, furs, etc.
- 31 2,800 Buick car, 1940, bought by F.M.G. *1940-1941*
- 32 1,000 Large Capchart Radio Gramophone, bought by me in the U.S.A. in 1937.
- 33 300 Large Telefunken Radio bought by me in Romania in 1939.
- 34 *137* 3,650 *3,650* Antique XVIIIth Century Venetian painted Bed, bought by me in Venice, Italy, in 1923.
- 35 530 Two Frigidaire Iceboxes, bought by me in the U.S.A. in 1937.
- 36 184 Underwood Typewriter, bought by me for my own use, in the U.S.A. in 1937.
- 37 6,500 Marble Head of a Child by Desiderio di Settignano, 15th Century, Italian. Bought for me at a sale in Vienna, by Marquis de Talleyrand, between 1922-1924.

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from the original

- 38 12,000 Large Ushak XVIII Century Carpet. Appraised by Prof. A. Upham Pope, the rug expert who knew the rug, at \$12,500 at least. I bought it in London in 1922.
- 39 4,500 Small Ushak, 16th Century. Prof. Pope appraised it at the very least at \$4,500.
- 40 3,000 Green Kala rug, very fine.
- 41 4,500 Rare pale blue Kala
- 42 1,200 Remaining rugs, all valued by Prof. Pope. I bought all of the above rugs in Cairo, Egypt, in 1928 and 1929.
- 43 2,000 Velvet pile carpeting for the dining room and upstairs halls in U.S.A. Legation in Romania. I bought this in U.S.A. in 1937.
- 44 3,000 Books, including some rare Art and other books as well as the "Survey of Persian Art", six volumes. Bought by F.M.G. over a period of time, one-half of cost furnished by L.B.G.
- 45 4,500 One Iron Bound Chest of Flat Silver for 36 people, original English Queen Ann. Money given me by my Father and I bought it in London in 1922.
- 46 1,200 Silver Gilt Spergno, centerpiece with 5 Waterford Crystal Bowls, 1770. Bought by me in 1920 with money given me by my Father.
- 47 750 English Queen Ann Silver Tea Pot, 1720. Bought by me in 1920 with money given me by my Mother.
- 48 300 Irish Silver Tray, 1780. Bought by me in London with money given me by my Mother.
- 49 600 Eleven Silver Gilt large Drinking Cups, French Empire. Bought by F.M.G. in London in 1914-1915.
- 50 350 Six George III Silver Bottle Holders, Coasters. Bought by me in England in 1923.
- 51 800 Large Silver Tray, George III, 1785. Bought by me in 1920 in London with money given me by my Father.
- 52 300 Two Silver Trays, George III, 1770. Bought by me in London in 1923.
- 53 2,500 Silver Queen Ann Tea Service, comprising six pieces. Bought in London by me in 1922 with money given me by my Mother.

- 50 750 Silver Queen Ann Hot Water Pitcher, English, 1720. Bought by me in London in 1922, with money given me by my Mother.
- 51 \$ 100 Two Georgian Silver Marrow Spoons, bought by me in England in 1920.
- 52 200 Two Large French Silver Basting Spoons, 1780, bought by me in England in 1920.
- 53 550 George III Silver Hot Water Urn standing on Silver Heater. Bought by me in London in 1921, with money given me by my Father.
- 54 700 Three George II Silver Tea Caddies in Antique Sharkskin Case, 1750. Bought by me in London in 1923 with money given me by my Mother.
- 55 400 Pair George II Silver Candlesticks, 1742. Bought by me in London in 1921 with money given me by my Father.
- 56 800 Pair George II Silver Candelabras with Arms, 1745. Bought by me in London in 1921 with money given me by my Mother.
- 57 150 Two Chamber Silver Candlesticks, date 1775. Bought by me in England in 1920.
- 58 250 Two George II Silver Sugar Sifters, date 1725. Bought by me in England in 1922.
- 59 400 Two George II Silver Sauce Boats, 1745. Bought by me in England in 1923.
- 60 100 Silver Desk Lamp. Bought by me in England in 1920.
- 61 550 Four Sheffield Plate George III vegetable Dishes and serving Platters, 1784. Bought by me in London in 1921 with money given me by my Father.
- 62 500 Remaining Silver, various pieces. Bought in England by me in 1920 and 1921.
- 63 1,200 Porcelain Tea service, Old Lowestoff, comprising nine pieces. Bought by me in London in 1923 with money given me by my Mother.
- 64 1,840 Porcelain Dinner Service for 32 people, Lenox China, bought in U.S.A. in 1927 by me.

- 65 \$ 360 Eight Serving Dishes, various sizes, same Set. Bought by me in U.S.A. in 1937.
- 66 2,044 Glass Service for 32 people, including glass for large cocktail parties and reception. Bought by me in U.S.A. in 1937.
- 67 985 Servants China, Glass and Flatware. Bought by me in U.S.A. in 1937.
- 68 ✓ 1,500 Two large upholstered Sofas, bought by me in the U.S.A. in 1937.
- 69 ✓ ⁶⁰⁰ 800 Four large upholstered Easy Chairs, bought in U.S.A. by F.M.G. in 1936.
- 70 8,520 Twenty-four Chippendale Dining Room Chairs, bought by me in U.S.A. in 1937.
- 71 ✓ 1,450 Dining Room Table, bought by me in U.S.A. in 1937.
- 72 ✓ ⁶⁰⁰ 500 Piano. Bought by me in Romania in 1939.
- 73 ✓ 1,425 Large Italian XVIIIth Century Inlaid Chest. Bought by F.M.G. from the Bordini Collection, Florence, Italy, between 1921 and 1924.
- 74 ✓ 500 Desk Chair XVIIIth Century, bought by F.M.G. in Italy between 1921 and 1924.
- 75 ✓ 1,000 Large Old English Oak Jacobean Table, bought by F.M.G. in London 1923.
- 76 ✓ 625 Large Antique Italian Refectory Table, bought by F.M.G. in Italy between 1921-1924.
- 77 ✓ 2,300 ^{Copy of the XVIIIth} Italian Desk, XVIIIth Century, bought by me in Italy in 1924. Encl. 100
- 78 ✓ 3,500 English Desk, XVIIIth Century, bought by me in England in 1923. Beautifully inlaid, with *wood and ivory, and gallery top.*
- 79 ✓ ⁹⁵⁰ 2,950 Italian, Tuscan, untouched XVth Century credenza (sideboard). Bought by me from the Bordini Collection, Florence, Italy, in 1922.
- 80 ✓ 2,500 Large Italian XVth Century Octagonal Center Table, with a separate base. Bought by me from the Bordini Collection, Florence, Italy, in 1922.

81. ✓ \$ 2,400⁵ Three Antique Chests of Drawers, English, William and Mary, one a Highboy and two with Inlay. Bought by me in England in 1927.
82. ✓ 400 Three Hanging Cupboards, bought by F.M.G. in Romania between 1937-1939.
83. ✓ 250 Double Bed with Mattress, bought by F.M.G. in U.S.A. in 1937.
84. ✓ 150 Single Bed with Mattress, bought by F.M.G. in U.S.A. in 1937.
85. ✓ 1,100 XVith Century small Italian Table. Bought by F.M.G. from the Bardini Collection, Florence, Italy, in 1922.
86. ✓ 275²⁷⁵ 350 Small French Table, XVith Century, bought by F.M.G. in France in 1920.
87. ✓ 1,100 Large XVith Century Italian Armchair with Original Red Velvet. Bought by F.M.G. in Italy between 1921-1924.
88. ✓ 3,150 Six XVth Century Italian Armchairs, with Original Velvets. Bought by me in Italy in 1923-1924.
89. ✓ 1,000 Tapestry Armchair, XVith Century. Bought by F.M.G. in Belgium in 1920.
90. ✓ 3,000 Set of Four XVIIIth Century Lacquer Chairs, English. Bought by me in London in 1921..
91. ✓ 150 Chaise Long, made to order for F.M.G. in Washington in 1937.
92. ✓ 50 Tea Table, bought by F.M.G. in U.S.A. in 1937.
93. ✓ 60 Two Bridge Tables, bought by F.M.G. in U.S.A. in 1937.
94. ✓ 3,300 Four Chippendale Armchairs, bought by F.M.G. in U.S.A. in 1936.
95. ✓ 2,400 Two XVth Century Gilded Wood Italian Carved Mirrors. Bought by me from the Bardini Collection, Florence, Italy, in 1922.
96. ✓ \$ 1,125 Five XVith Century Gilded Wood Italian Candlesticks

with genuine Parchment shades. Bought by me in Italy in 1921.

- 97 ✓ 250 Tapestry Pine Screen. Bought by F.M.G. in Belgium in 1920.
- 98 2,550 Curtains for the Legation Residence, Brocade, Chintz and Net. Bought by me in London and Italy in 1937-1938.
- 99 ^{10,000}
8,000
geto Flemish Tapestry, XVIIIth Century. Bought by me in Florence, Italy, in 1922, from the Marquis Torrigni-ani. Valued at \$10,000.
- 100 1,470 Forty-two meters of Antique Red and Gold Italian Brocatelle Wall Hangings. Bought by me in Italy in 1924.
- 101 3,000 XVIIIth Century Spanish Cut Velvet Hanging two 1/2 to three meters long. Bought by me in Spain in 1922.
- 102 2,550 XVIIIth Century Venetian Cut Velvet Hanging, about two 1/2 to three meters long. Bought by me in Italy in 1923.
- 103 350 Piece of Antique Italian Velvet about three meters long. Bought by me in Italy in 1928.
- 104 500 Italian XVIIIth Century Velvet Bishop's Cope (Palotti) Bought by me in Italy in 1928.
- 105 ✓ 250 Two Persian Pottery Lamps and Silk Shades. Bought by me in New York in 1936.
- 106 ✓ 1,200 Two Chinese Ming period Vases. Bought by F.M.G. in London in 1918.
- 107 ✓ ^{1,500}
250 Antique Italian Bronze Mortar. Bought by me in Italy in 1922.
- 108 600 Four Italian Majolica Vases. Bought by me in Italy in 1922.
- 109 600 Four XVIIIth Century Italian Wrought Iron Standing Candelabras. Bought by me in Italy in 1923.
- 110 250 Antique Lowestoff China Soup-tureen Centerpiece. Bought by me in London in 1924.

- 111 \$ 300 Antique Italian Green Pottery Bowl with Antique tall wooden stand. Bought by me in Italy in 1924.
- 112 4,500 Persian antique Kashan, Cavalier Bowl, very early. Valued by Prof. Pope as not less than \$5,000. Bought by me in Persia in 1933.
- 113 800 Persian Antique Gabri Bowl, with Eagle, very early. Valued by Prof. Pope at \$1,000. Bought by me in Persia in 1933.
- 114 350 Persian Antique Minai Ray Bowl. Bought by me in Persia in 1933.
- 115 350 Persian Antique Siveh Minai Bowl. Bought by me in Persia in 1933.
- 116 450 Persian Antique Golden Luster Large Ray Dish. Bought by me in Persia in 1933.
- 117 2,400 Pair of Guns in Case by Purdy of London. Bought by F.M.G. in London in 1934.
- 118 950 A Gun by Purdy of London. Bought by F.M.G. in London in 1933.
- 119 600 A Gun bought by F.M.G. in France in 1935.
- All these Guns were appraised by a Dealer in Washington who knew them.
- 120 2,168 Two Trunks of Blankets, Swiss Linen Sheets and Pillow Cases, Comforters and Bedspreads. Bought by me in Switzerland and in U.S.A. in 1936 and 1937.
- 121 353 Damask Table Cloths and Napkins. Bought by me in London in 1937.
- 122 725 Two Embroidered Italian Linen Table Sets for 12 people with 12 Napkins for each. Bought by me in Italy in 1937.
- 123 1,875 Four Embroidered Italian Linen Table Sets for 24 with 24 Napkins for each. Bought by me in Italy in 1937.
- 124 1,600 Eight Linen and Lace Table Sets for 12, with 12 Napkins for each. Bought by me in Italy in 1937.

- 125 \$ 725 Two large Lace Table Cloths with 24 Napkins. Bought by me in Italy in 1937.
- 126 500 Ornaments, various, bought by me in different places.
- 127 635 Kitchen Utensils, bought by me in the U.S.A. in 1937, for use in the Legation.
- 128 733 Servants Linen, Sheets, pillow Cases, Blankets and Aprons. Bought by me in the U.S.A. in 1937.
- 129 661 Servants Bath Towels, Face Towels, Pantry Towels, Cloths, Mats, Pillows, etc. Bought by me in the U.S.A. in 1937.
- 130 200 Four Venetian Glass Table Centerpieces, bought by me in Venice in 1923.
- 131 ^{1 1/2} 1,500 Chinese Vase, Sung Dynasty. Bought by F.M.G. in London in 1919.
- 132 2,800 Persian Manuscript of "Firdausi's Shahnameh", containing fine Persian Miniatures. Bought by me in Cairo, Egypt, in 1929.
- 133 24,000 Bust of a Young Apollo, by Donatello, 1386 - 1466. Bought for me in Italy in 1926 by Dr. W. R. Valentini of the Detroit Museum of Art and one of the Founders of the Toledo, Ohio, Art Museum.
- 134 ^{2,800} ~~3,000~~ Four original Queen Ann Armchairs, two covered in velvet and two in needlework. Bought by F.M.G. in England in 1919.
- 135 ^{5,300} ~~6,000~~ Bracket Clock by Thomas Tompion. Bought by F.M.G. in London at an Auction Sale in 1918.
- 136 ⁸⁰⁰ ~~1,000~~ Pair early Georgian Pillar Candlesticks. Bought by F.M.G. in England in 1921.
- 137 ⁸⁰⁰ ~~1,100~~ Chippendale Fire Screen with XVIIIth Century English Tapestry. Bought by F.M.G. in England in 1927.
- 138 800 Pair 18th Century Mahogany Torchiers, fluted stems and pierced galleries. Bought by F.M.G. in England in 1917.
- 139 ^{6,500} ~~7,000~~ Italian carved walnut Cassone (chest) XVIIIth Century. Bought by F.M.G. in Italy between 1921-1924.

140

2,000

Small rectangular Louis XVth table, mahogany, veneered with tulip wood, inlaid and on each of the four sides is an oval slab of Sevres porcelain. Bought by F.M.G. in France in 1920.

N.B. Items numbered 73, 75, 76, 85, 87 and 94 were bought by Franklin M. Gunther for Louisa B. Gunther with funds furnished by the latter.

I hereby certify that the foregoing Schedule of Property Losses is a true statement of losses sustained in Rumania, which losses are the subject matter of the litigation in the above entitled case.

L B G

LOUISA B. GUNTHER

SUBSCRIBED AND SWORN to before me this 4 day of December,

1963.

Rachel C. Hebron

Notary Public

D.C.

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from the original

[Caption Omitted in Printing]

V.

COMMISSIONER OF INTERNAL REVENUE

RESPONSE

AFFIDAVIT OF MICHAEL ROSCENIA

The undersigned Michael Roscena, upon being duly sworn according to law and under oath hereby depose and state as follows:

1. That he is a resident of the District of Columbia, but was born a Rumanian citizen and lived a substantial part of his life in that country and is thoroughly familiar with the Rumanian language.
2. That he was a member of the Rumanian bar and is familiar with the statutory provisions of the Rumanian Penal Code.
3. That attached to this Affidavit is a true copy of, and translation from Rumanian to English, of Articles 521, 522, 523, and 531 of the Rumanian Penal Code (Modification 1903-1907), relating to "Theft" and "Robbery", which was in effect through 1907.

11 F
Michael Roscena

Subscribed and sworn to before me this 7 day of June,

1907.

George H. Achen
Notary Public, D.C.

CONSTITUTION

RI-EX-14-A

TITLE I

Concerning the territory of Roumania

- Art.1.- The Roumanian Kingdom is a single and indivisible national State.
- Art.2.- The territory of Roumania is inalienable.
The frontiers of the State cannot be changed or rectified other than by virtue of a law.
- Art.3.- The territory of Roumania may not be colonized by a people of foreign race.
- Art.4.- From an administrative point of view Roumania's territory is divided in districts (departments), the districts in townships (communes).
Their numbers, extension and subdivisions are to be established in accordance with the rules provided by the laws of administrative organization.

TITLE II

Concerning the rights of Roumanians

- Art.5.- Roumanians, without distinction of ethnic origin, of language or religion, shall enjoy liberty of conscience and liberty of the press, liberty of meetings, liberty of associations and all liberties and rights as established by law.
- Art.6.- The present Constitution and other laws regarding political rights shall determine which, other than the quality of being Roumanian, are the conditions necessary for the exercise of these rights.
Special laws, passed with a two-thirds majority, shall determine the conditions under which women may exercise political rights.
Women's civil rights shall be established on the basis of full equality of the two sexes.
- Art.7.- Differences of religious and confessional belief, of ethnic origin and of language, shall not constitute a hindrance in Roumania to the acquiring and exercising of civil rights.

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Only naturalization shall place a foreigner on an equal footing with a Roumanian as concerns the exercising of political rights.

Naturalization shall be granted individually by the Council of Ministers, after verification by a Commission of the First-President and Presidents of the Court of Appeals of the national Capital, establishing that the applicant fulfils the legal conditions.

A special law shall determine the conditions and procedure in accordance with which foreigners are granted the naturalization.

The naturalization has no retroactive effect.

The wife and under age children are benefiting, according to the provisions of the law, of the naturalization of the husband or father.

- Art.8.- No distinction of birth or of social class shall be permitted in the State.
All Roumanians, without distinction of ethnic origin, of language or of religion, are equal before the law and shall be liable, without distinction, to contribute to public taxes and charges.
They alone are eligible for public, civil and military appointments and dignities.
Special laws shall determine the Statute of civil servants.
Foreigners may not be admitted to public appointments except in exceptional cases and as established by law.
- Art.9.- On Roumanian soil all foreigners enjoy the general protection given by the law both as regards person and property.
- Art.10.- All privileges of whatsoever nature and class exemptions and monopolies are abolished in perpetuity in the Roumanian State.
Nobility titles are and shall not be admitted in the Roumanian State.
Foreign decorations may be worn by Roumanians only with the Royal assent.
- Art.11.- Individual liberty is guaranteed.
Nobody may be prosecuted or searched except in those cases and in accordance with the formalities provided by law.
Nobody may be detained or arrested other than under a judicial warrant, the terms of which must be communicated to him at the time of arrest or latest within 24 hours of detention or arrest.
In a case of manifest guilt, detention or arrest may be carried out immediately, and the warrant shall be issued within 24 hours and shall be communicated to the prisoner in accordance with the preceding paragraph. Nobody may

- Art.12.- Nobody may be removed against his will from the judicature to which he is entitled by law.
- Art.13.- The domicile is inviolable.
No domiciliary visit may be carried out except by the competent authorities, in those cases provided by the law and in accordance with the formalities which it prescribes.
- Art.14.- No punishment can be created or applied except on the basis of a law.
- Art.15.- No law may establish the punishment of confiscation of property.
- Art.16.- The death penalty shall not be re-established except in the cases laid down in the military penal code for time of war.
- Art.17.- Property of every nature as well as debts due by the State are guaranteed.
Public authority, on the basis of a law, is entitled for the purpose of public welfare works, to use the subsoil of any real estate, with the obligation of compensating the damage caused to buildings and structures extant on the surface (ground).
If agreement is not reached the compensation shall be determined by the Courts.
Nobody can be expropriated except for the purpose of public welfare and after a just and previous (prealable) compensation established by the Courts.
A special law shall determine the cases of public welfare (utility), the procedure and mode of expropriation.
With the exception of the expropriation for traffic network (voies de communication) public health, defense of the country and works of military interest (necessity), cultural import and general direct necessity for the State and public administrations, the other cases of public welfare should be established by laws voted with a majority of two thirds.
The laws regarding the levelling and enlarging towns' streets, as well as those regarding rivers crossing or skirting towns, are to be in force throughout the whole territory of the Kingdom.
- Art.18.- Only Roumanians and naturalized Roumanians may acquire title to and own rural real estate in Roumania. Foreigners shall only have the right to the revenues from such real estate.
- Art.19.- Mineral deposits as well the riches of every description of the subsoil are the property of the

State. Masses of common rock and quarries of materials suitable for constructional use are excepted, this, however, without prejudice to rights acquired by the State by virtue of previous laws.

A special mining law shall establish the manner and conditions for the exploitation of these subsoil deposits, shall fix the royalties of the owners of the surface land and shall at the same time state the possibility and measure in which the latter shall participate in the exploitation of these riches.

Rights already acquired shall be taken into consideration provided they are in conformity with the exploitation of the subsoil, and shall be subject to certain distinctions which will be drawn in the special law.

Mining exploitation concessions instituted or granted in accordance with the laws to-day in force shall be respected for the period for which they have been granted, whilst extant mining exploitations, granted by owners, shall be respected so long as exploitation shall continue. No concessions in perpetuity may be made.

All concessions and exploitations referred to in the preceding paragraph must, however, conform to the regulations which shall be laid down by law, and which shall also provide the maximum duration for such concessions and exploitations, and which shall not exceed fifty years from the promulgation of this Constitution.

Art. 20.- Roads of communication, atmospheric space and navigable and floatable waters are for the common public use.

Waters capable of producing motive power and those which can be used for the common good are public property.

Rights already acquired shall be respected or they shall be compensated through expropriation for public welfare, after a just and previous indemnity.

Special laws shall determine the measure in which the above rights should be recognized for the benefit of the owners, the mode of expropriation as well as the indemnities for the using of the surface and of the extant installations.

Art. 21.- All productive agencies shall enjoy an equal measure of protection.

By means of laws the State may intervene in the relations between such agencies in order to prevent economic or social disputes.

The right of work shall be protected. (liberty)
Social insurance (security) of the workers shall be regulated by law for cases of sickness, accident, etc.

- Art.22.- There shall be absolute liberty of conscience.
The State guarantees to all cults a special liberty and protection so long as their exercise shall in no way encroach upon public order, good morals and the laws concerning the organization of the State. The Christian Orthodox Church and the Greek-Catholic Church are Roumanian Churches.
The Roumanian Orthodox Church being the religion of the great majority of Roumanians is the dominant Church of the Roumanian State ; whilst the Greek-Catholic Church takes precedence of all other cults. The Roumanian Orthodox Church is and shall remain independent of any foreign hierarchy, but shall maintain its unity with the ecumenic Church of the East as concerns its dogmas or beliefs.
In the Roumanian Kingdom the Christian Orthodox Church shall have an unitary organization with the participation of all constitutive elements, clerical and laic.
A special law shall establish the basic principles of this unitary organization as well as the mode according to which the Church shall regulate, lead and administer through her own organs and under the supervision of the State, her activities regarding religion, culture, foundations and epitropies. Both spiritual and canonic questions of the Roumanian Orthodox Church shall be regulated by a single central synodal authority.
The metropolitans and bishops of the Roumanian Orthodox Church shall be elected in accordance with a special law.
The relations between the various cults and the State shall be established by law.
- Art.23.- Documents relating to the civil state are attributes of the civil law.
The drawing up of these documents should always precede religious benediction.
- Art.24.- Education is free in the conditions established by special laws and in so far as it shall not be contrary to good morals and public order.
Primary education is compulsory. This education shall be provided free in the State schools.
The State, districts and towns shall provide assistance and facilities to pupils without means in all grades of education to the extent and in the manner prescribed by law.
- Art.25.- The Constitution guarantees to everybody the right to communicate and publish their ideas and opinions by word of mouth, in writing and through the press, each individual being answerable for abuse of this right in cases set out in the penal code, but which

may in no case restrict or limit the right itself. No exceptional law may be enacted in this connection. Neither censorship nor other preventive measure against the publication, sale or distribution of any publication may be introduced.

No preliminary authorization from any authority is required for the appearance of any publication. No caution money shall be demanded from journalists, writers, editors, printers or lithographers.

The press shall never be placed under cautionary regime.

No newspaper or publication may be suspended or suppressed.

Every periodical publication of whatsoever nature must have a responsible director and in his absence a responsible editor. The director or editor must be entitled to full civil and political rights.

The name of the director and the name of the editor shall be clearly and permanently shown on the front of the publication.

Before the appearance of any periodical publication, its proprietor is obliged to make it formally known and to inscribe its name at the commercial court.

The sanctions for these dispositions shall be provided by a special law.

- Art. 26.- As regards publications other than periodicals, the author is answerable for what is written therein, or, in absence of an author, the editor; the owner of the printing establishment is answerable when the author and editor have not been discovered. For periodical publications responsibility attaches in the order named to: the author, the director or the editor. The proprietor is in all cases jointly answerable for the payment of civil damages. Delinquencies of the press are tried by juries, with the exception of the cases herein established which shall be tried by the ordinary courts in accordance with common law:
- a) Delinquencies committed against the sovereigns of the State, the Crown Prince, members of the Royal Family and Dynasty, the heads of foreign states and their representatives;
 - b) Direct instigations to murder and rebellion in those cases where such instigations have not been carried into effect;
 - c) Calumnies, insults, defamations against private persons or public servants, whoever they may be, and whether attainted as regards their private lives or their personal honour.
- Preventive arrest in matters concerning the press is forbidden.

Art.27.- The privacy of letters, telegrams and of telephonic conversations is inviolable.

A special law shall determine the cases, in which the Courts in the interest of penal instruction, could make an exception to the present provision. The same law shall determine the responsibility of State agents and private persons for the violation regarding the secrecy of letters, telegrams and telephonic conversations.

Art.28.- Roumanian, without distinction of ethnic origin, of language or of religion have the right of peaceful meeting, without arms, complying with the laws which regulate the exercise of this right, in order to discuss every sort of question; for this there is no need of any previous authority. Meetings in the open air are allowed, with the exception of public squares and roads. Meetings, processions and demonstrations in public roads and squares are subject to police regulations.

Art.29.- Roumanians, without distinction of ethnic origin, of language or religion, have the right to associate, complying with the laws which regulate the exercise of this right. The right of free association does not in itself imply the right to create a juridical body. The conditions, under which juridical personality shall be granted, should be established by special law.

Art.30.- Everybody has the right of approach to public authorities by petitions signed by one or more persons, but is precluded from petitioning except in the names of the signatories. Only properly constituted authorities have the right of submitting petitions in a collective name.

Art.31.- No preliminary authorization is required for initiating prosecution against public officials with regard to their administrative acts by the damaged parties; the special rules established, concerning the ministers, are however to be respected. The cases and the mode of prosecution shall be determined by a special law. Special provisions of the Penal Code shall determine the penalties of the accused.

Art.32.- No Roumanian, without the authority of the Government may enter the service of a foreign state, without himself thereby losing his own citizenship. The extradition of political refugees is forbidden.

TITLE III

Concerning the powers of the State.

- Art.33.- All the powers of the State emanate from the nation, which cannot exercise them other than by delegation and in accordance with the principles and regulations set out in the present Constitution. Leg
- Art.34.- Legislative power is exercised collectively by the King and the national Representation. The national representation is subdivided into two Assemblies :
The Senate and the House of Deputies.
Every law requires the assent of each of the three branches of the legislative authorities.
No law may be submitted for the Royal assent except after it shall have been debated and freely adopted by the majority of both Houses.
- Art.35.- Initiative as concerns laws is given to each of the three branches of the legislative authorities. Nevertheless every law concerning State revenue and expenditure or the strength of the army must first be adopted by the House of Deputies.
- Art.36.- Authoritative interpretation of the laws shall be solely within the legislative authorities (within the competence of legal authorities).
- Art.37.- The promulgation of laws adopted by both Houses shall be effected by and be the duty of the Minister of Justice, who shall keep one of the originals of the law passed, whilst the second original shall be kept in the State Archives.
The Minister of Justice is also the Keeper of the Great Seal of State.
Each year The Minister of Justice shall publish the collection of laws and regulations, in which the laws shall be classified under an order No. according to the date of promulgation.
- Art.38.- No law, general administration regulation -district or commune- can be obligatory before being published in the decisive form of a law.
- Art.39.- Executive power is invested in the King, who exercises it in the manner prescribed by the Constitution.
- Art.40.- Judicial power is exercised by its constituted organs. Their decisions are pronounced by virtue of the law and are executed in the name of the King.
- Art.41.- The exclusively district and commune interests are

regulated by District and Commune Councils according to the principles established by the Constitution and special laws.

Chapter I

Concerning National Representation.

Art.42.- Members of the Houses of Assembly represent the Nation.

Art.43.- Sitzings of the Houses of Assembly are public. Their regulations lay down the cases and manner in which these sittings may be declared secret.

Art.44.- Each of the Houses verifies the credentials of its members and judges protests which may be raised in this connection.
No election may be invalidated other than by the vote of two thirds of the number of members present.

Art.45.- Nobody may at the same time be a member of one and of the other House of Assembly.

Art.46.- Deputies and Senators appointed by executive authority to a paid office, and which they accept, lose, in law, their mandate of representation of the nation.

This regulation is not applicable to Ministers and Undersecretaries of State. Incompatibility is determined by the electoral law.

Art.47.- At the beginning of each legislature and of each ordinary session, the House of Deputies and the Senate elect from amongst their number a president, vice-president and committee, in accordance with their own regulations.
etc.

"National Representation" articles up to art.63 Incl.

SECTION I

Concerning the House of Deputies

art.64 to 66 incl.

SECTION II

Concerning the Senate

art.67 to 75 incl.

SECTION III

Concerning the Legislative Council

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Art.76.- A legislative Council shall be constituted whose function shall be to assist in a consultative capacity in the preparing and coordinating of laws, emanating either from the executive authority or from parliamentary initiative, as well as for drawing up general regulations for the application of laws. Consultation with the Legislative Council is obligatory for all drafts of laws with the exception of those concerning budgetary credits ; if, however, within a term fixed by law, the Legislative Council shall not give its advice, the Houses may proceed to debate and to approve the drafts. A special law shall determine the organization and manner of functioning of the Legislative Council.

CHAPTER II

Concerning the King and the Ministers

SECTION I

Concerning the King

art.77 up to 91 incl.

CHAPTER III

Concerning the Ministers

art.92 up to 100 incl.

Organization of the Courts, Armed Forces, District and town Institutions, General Regulations : art.101 up to 128 incl.

TITLE VII

Concerning the Revision of the Constitution

Art.129.- The Constitution may be revised in whole or in part on the initiative of the King or of either of the Houses of Legislature. Following such initiative, both Houses, meeting separately, shall decide by absolute majority whether it is desirable that the rules of the Constitution should be revised. Immediately the necessity for revision has been admitted, both legislative Houses choose from amongst their number a mixed commission which will propose the text of the Constitution which is to be subjected to revision. After the report of this commission shall have been read in both Houses, twice within a period of fifteen days, both Houses, in joint session, under the presidency of the elder of the two Presidents, and in the presence of at least two

thirds of the total of members of which they are composed, shall definitely decide by a two thirds majority which articles are to be revised. Following this vote the two Houses are automatically dissolved under the law and the electoral body shall be convened within the period laid down by the Constitution.

Art.130.- The new Houses of Legislature proceed, in agreement with the King, to modify the articles to be revised. In this case the Houses cannot deliberate unless at least two thirds of the members of which they are composed are present, and no change may be adopted unless it shall receive at least two thirds of the votes. The Houses of Legislature elected for the revision of the Constitution continue in being for the customary constitutional duration or term and, except for the modification of the Constitution, they function in the same way as ordinary Legislative Assemblies. If the Houses of Legislature elected for revision purposes are unable to fulfil their mission, the new Houses shall be of like character.

TITLE VIII

Transitory and supplementary regulations.
art.131 to 138 incl.

RUMANIAN PENAL CODE

Feb 24. 1917.

(Collection 1893-1917)

TITLE XIV

CRIMES AND MISDEMEANOURS AGAINST PROPERTY (extrimacy)

CHAPTER I

THE THEFT

Art. 324. - He who takes a movable thing, not belonging to him, from the possession or custody of another without the consent of same and with the purpose to unlawfully appropriate it is perpetrating

the crime of theft.

Art. 420. - The theft is qualified (i. e. with aggravated circumstances) in the following cases:

..... 4. When it is perpetrated:

a) through forging (imitating) by the author (criminal) of an official quality or mission on behalf of an authority or of a public service;

b) through the teaching, disguising or inventing of the infractor;

c) by two or more persons;

d) by an infractor who had on himself weapons or drugs, although not using them;

5. When it is perpetrated:

a) by a public servant (public official) who is abusing his official quality.

CHAPTER II

ROBBERY AND REIDERY

Section I

The Robbery

Art. 523. - He who takes by violence or threat a movable thing, not belonging to him, from the possession or custody of another with the purpose of unlawfully (without right) appropriating it, is perpetrating the violent act (delict) of robbery ..

Art. 524. - The robbery is punished with prison from 5 to 12 years when it is perpetrated:

- ... 3. By two or more persons;
- ... 5. By one or more persons who had on them (all or some of them) weapons or drugs.

THE CONSTITUTION

OF THE ROMANIAN PEOPLE'S REPUBLIC

Text voted by the Grand National Assembly
in the April 13, 1948 session.

TITLE II

- Art. 8 Private property and the right to inherit are recognized and guaranteed by the law. Private property gained through work and thrift enjoys special protection.
- Art. 9 The land belongs to those who work it. The State protects the peasant work property. It encourages and supports the village cooperation. In order to stimulate the advancement of agriculture the State can create agricultural enterprises of the State.
- Art. 10 Expropriations for the purpose of public welfare can be made on the basis of a law and with a just compensation established by the Courts.
- Art. 11 on the possible nationalization of corporations.
- Art. 12 on the duty to work
- Art. 13 The State accords protection to private initiative which serves general interests.
- Art. 14 on the control of internal and external commerce by the State.
- Art. 15 on the planification of national economy.

TITLE III

Fundamental rights and duties of citizens

- Art. 16 All citizens of the People's Republic of Romania without distinction of sex, nationality, race, religion or degree of culture are equal before the law.
- Art. 17 on racial and ethnical hatred
etc.
- Art. 27 The freedom of conscience and the freedom of religion are guaranteed by the State. Religious cults are free to organize and can function freely if their ritual and practice are not contrary to the Constitution, public security and good mores (morality).

No denomination, congregation or religious community can open or support institutions of general education they can have only schools under State control for preparing their cult's personnel.

....

Art.28 The individual liberty of citizens is guaranteed. Nobody can be arrested and detained over 48 hours without a warrant of the Courts (State Attorney office) of law established organs (judges) of Instruction or the authorization of Courts according to the provisions of the law.

Art.29 The domicile is inviolable. Nobody can enter ~~in~~ the domicile or residence of citizens without their agreement, only in their presence and on the basis of a written order of the competent authority or in the case of flagrant delict.

Art.30 Nobody can be sentenced and forced to execute the punishment except on the basis of a Court decision pronounced in conformity to the law.

Art.31 The freedom of the press, of speech, meetings, processions and manifestations is guaranteed. The exercising of these rights is insured by the fact that the means of printing, the newsprint and meeting halls are at the disposal of those who work.

Art.32 on the right of association

Art.33 The secret of the mail (correspondence) is guaranteed. Only in the case of penal prosecution (instruction) under the state of siege or in the case of mobilization (for war) the mail can be controlled.

Art.34 on the right of petition
etc.

Ex. A.
TO
J. APP

50 T. C. No. 89

TAX COURT OF THE UNITED STATES

LOUISA B. GUNTHER FARCASANU, Petitioner v. COMMISSIONER OF
INTERNAL REVENUE, Respondent

Docket No. 3533-62.

Filed September 17, 1968.

Petitioner, the widow of the American Minister to Rumania who died in Bucharest a few days after Rumania declared war on the United States in December 1941, was forced to leave valuable furnishings and art objects in Rumania when she was evacuated in January 1942. Sometime after 1946 but before 1952 this property was seized or confiscated by agents of the Communist regime in control of the Rumanian Government acting under the color of various Government decrees. In 1956 petitioner filed her claim in the amount of \$295,716 with the Foreign Claims Settlement Commission on account of the confiscation of this property and in 1959 was awarded \$103,445 thereon, of which award she received the net amount of \$23,386.45. In her return for 1959 petitioner claimed a deduction on account of the loss of this property which she now contends should be allowed as a "theft" loss. Respondent disallowed the deduction and also determined that the net amount of her recovery on the claim filed with the Foreign Claims Settlement Commission was includable in petitioner's taxable income for that year as capital gain since he contended that she had not shown any basis in the confiscated property.

AVAILABLE

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Held, confiscations under color of law of petitioner's property by agents of the Communist Government of Rumania, even though arbitrary and despotic, do not give rise to theft losses deductible under sec. 165 (c)(3), I.R.C. 1954.

Held, further, petitioner's basis in the confiscated property was an amount at least equal to the amount of her net recovery on her claim.

Bartholomew B. Coyne, for the petitioner.

Charles F. T. Carroll, for the respondent.

Respondent determined a deficiency in petitioner's income tax for the calendar year 1959 in the amount of \$47,922.08. Two related questions are presented herein. The first is whether petitioner is entitled to a deduction for "theft" in the amount of \$192,271.50 or any other amount on account of the seizure or confiscation of certain of her property in Rumania after a Communist regime assumed control in that country in 1945, and, if so, whether such deduction was properly claimed in 1959. The second is whether petitioner realized long-term capital gain in 1959, on

account of and in the amount of the net proceeds of a payment made in that year to petitioner by the Foreign Claims Settlement Commission in the net amount of \$23,386.45 as partial compensation for her property loss in Rumania.

FINDINGS OF FACT

Some of the facts have been stipulated and they are so found.

The petitioner, Louisa B. Gunther Farcasanu, resided in Washington, D. C., during the calendar year 1959 and at the time of the filing of the petition herein. Her Federal income tax return for 1959 was filed with the district director of internal revenue at Baltimore, Maryland.

Petitioner married Franklin M. Gunther, then a U. S. foreign service officer, in England in 1918.¹ After serving in the foreign service in various capacities and in various countries Franklin Gunther resigned from the foreign service in 1930 or 1931. Although between 1931 and 1937 he was associated in some way with an investment firm, he devoted most of his time, talents and money to other interests, among

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Petitioner married Mihail Farcasanu sometime after the filing of her petition in this case, over 20 years after the death of Franklin Gunther. At the time Franklin Gunther became American Minister to Rumania, Mihail Farcasanu was a prominent lawyer, journalist and political figure in Rumania. He escaped from Rumania in 1946 and is now a resident of Georgetown, Washington, D. C.

which was his collection of Persian and oriental art objects, a lifetime interest of his which was shared by petitioner.

Franklin Gunther was appointed United States Minister Plenipotentiary to Rumania in 1937. Petitioner and her husband moved to Bucharest, Rumania, in that year, taking with them not only their collections of rare and valuable art objects, but also furniture, paintings, oriental rugs, glassware, china, silverware and other personal property sufficient to appropriately and elegantly furnish the residence formerly occupied by the United States Minister to Rumania who had preceded Franklin Gunther in office, and later, a large residence which Gunther himself leased. This personal property, most of which belonged to Franklin Gunther, was shipped to Rumania at the expense of the U. S. State Department in two steel vans from Washington, D. C. In addition to the property shipped from this country to Rumania, petitioner purchased curtains, linens and other household effects while in England and Italy, en route to Bucharest.

Franklin Gunther was stricken by leukemia in the fall of 1941 and died on December 22, 1941. Just prior to his death, on December 11, 1941, Rumania declared war on the United States. It then became necessary for the American Legation to be closed and for the American officials

connected with the Legation to withdraw from Rumania. For this purpose the Rumanian government arranged a special train to transport American officials and their families out of the country in January of 1942. It was not possible for petitioner to remove the body of her husband from the country, nor did the circumstances of her departure allow her to take any more of the Gunther property located in Rumania than she could carry with her. Before leaving Bucharest petitioner packed most of the belongings owned by her and her husband and placed them in an air raid shelter of the United States Chancellery building, which was to be supervised by the Swiss Legation. Other parts of the property were placed by petitioner with friends in Rumania. In addition, a few paintings by Rumanian artists which were owned by the Gunthers were left in the Toma Setlian Museum in Bucharest. Petitioner arrived in the United States early in 1942.

All of the property in Rumania owned by Franklin Gunther at the time of his death was bequeathed to petitioner by his will, which was admitted to probate in the Court of the County Judge, Leon County, Florida.

An armistice was signed between Rumania and the Allies (the Soviet Union, Great Britain and the United States) on September 12, 1944, under which Rumania withdrew from the

war as an ally of Germany and agreed to enter on the side of the Allied Powers against Germany. Under the armistice the Allied High Command, which was controlled by the Soviet Union and purportedly acted on behalf of all of the Allied Nations, was given extensive powers over, inter alia "the printing, importation and distribution in Rumania of periodical and non-periodical literature, the presentation of theatrical performances and films, the work of wireless stations, post, telegraph and telephone" as well as control over the Rumanian civil administration "for the purpose of securing the execution of [the] armistice terms." By March of 1945 the Soviet Union, the only Allied Power with troops in Rumania, in collaboration with Rumanian Communists had succeeded, by a show of force, in establishing a political regime in control of the government of Rumania which was dominated by Communists and which operated without regard to constitutional safeguards even though the constitution of Rumania which had been in existence since 1923 had not formally been abrogated and even though Rumania's King Michael remained the nominal head of the government.

During and after 1945 this regime dominated by Russian and Rumanian Communists issued numerous edicts, decrees or proclamations, dealing with such matters as confiscation of private property under certain circumstances

and restrictions relative to the renting of private housing accommodations. For example, a decree was issued on April 24, 1945, providing for the confiscation of property of political enemies of the Rumanian government. During 1945 and 1946 there was widespread taking of property, arrests, and other intimidating and repressive acts on the part of the Communists in Rumania affecting "unfriendly" Rumanians.

In 1946 the United States and Great Britain formally recognized the Communist regime in Rumania in the hope or expectation that free elections would be held. The repressive tactics of the Communists subsided after this recognition. In the fall of 1947 elections were held in Rumania and the Communist candidates were announced as victors despite the strong protests of the United States and Great Britain that the results had been falsified. In December of 1947 Communist troops surrounded the Rumanian royal palace and King Michael was forced to abdicate. In 1948 the Rumanian Constitution of 1923 was replaced by the Constitution of the Rumanian People's Republic.

Petitioner returned to Bucharest in November of 1945. Shortly after her arrival she ascertained to her satisfaction that the property she had left in the U. S. Chancellery building, with friends, and at the museum were intact, although she did not unpack the crated goods to examine them.

An administrative officer of the American Mission² in Bucharest informed petitioner early in 1946 that her property stored in the air raid shelter of the Chancellery building, authority over which had been reassumed by the United States from the Swiss, would have to be moved in order that the shelter could again be used by the American diplomats in the conduct of their official duties. Thereupon, petitioner arranged for these belongings to be moved into the residences of three or four friends in Bucharest. Either the same or another official of the American Mission attempted to determine from petitioner whether or not she wanted her property and the body of her husband returned to the United States, but no definite decision was made by her at that time. Petitioner was advised by one friend who retained a position of nominal prominence in the Rumanian Ministry of Foreign Affairs that because of the political instability and disorders then existing in Rumania she should not attempt to remove her property from the country, at least until the signing of a formal peace treaty. During 1946, affairs in Rumania were in chaos with armed bands attacking houses, stopping trains and perpetrating many robberies.

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Apparently the United States was represented in Rumania by the U. S. Mission in Bucharest from 1944 until after 1947, at which time a minister was appointed and the Mission resumed the status of a Legation.

Petitioner was advised by the head of the American diplomatic Mission in Bucharest, who later became Minister to Rumania after the signing of a treaty of peace between Rumania and the United States, that she should not attempt to remove her property from Rumania at that time. Petitioner wished to leave Rumania in 1946, but was persuaded by the head of the American Mission to stay on because of her close friendship with the mother of the King of Rumania and her connections with the royal family which made it possible for her to obtain information from the palace which was of value to the American Mission. Petitioner remained in Rumania until early in 1947, at which time she hurriedly returned to the United States after being informed that her mother had suffered a stroke in the United States. Her mother died later in the year. Petitioner took with her only such of her personal property as could be taken with her on her airplane flight. Petitioner never returned to Rumania after 1947, and never saw any of the property she had left there after that time.

At some time in 1947 a member of the American Diplomatic Mission was able to arrange for the shipment of a "lift van" of his own household furnishings from Rumania to the United States without damage. At or about the same time personal property of another American official which had been packed and left in Rumania in 1942 was shipped out of Rumania and was damaged in transit.

After returning from Rumania to the United States early in 1947, petitioner was advised by her brother-in-law, Ray Atherton, a distinguished American diplomatist who had served as Minister to Bulgaria when Franklin Gunther was Minister to Rumania, that a peace treaty between Rumania and the Allies would soon be consummated, that this would facilitate the recovery of her property, and that if her property were not returned to her, provision would be made under the treaty for compensation for individuals in her situation out of blocked Rumanian funds held by the United States since 1940 in the amount of some 22 million dollars, which would be used to satisfy claimants against Rumania. The treaty of peace with Rumania, which became effective on September 15, 1947, contained provision for the compensation of U. S. nationals for property loss or damage suffered at the hands of the Rumanian government between September 1, 1939 and the effective date of the treaty.

On October 8, 1948, the following telegram was sent by an American official in Bucharest to the State Department:

Informed that Rumanian Government has requisitioned house containing certain property said to belong to Mrs. Franklin Mott Gunther, 2812 N Street N W Washington, widow of former U. S. Minister Bucharest.

Department may wish ascertain owners wishes concerning disposition this property. If desired, Legation will endeavor afford protection and assist in any other way possible.

Following correspondence between State Department officials and petitioner and between the State Department and its representatives in Bucharest, Francis Flaherty, then acting as Assistant Chief of the Division of Protective Services of the Department of State, sent the following communication to the Officer in Charge of the American Mission, Bucharest, on January 19, 1949:³

The Secretary of State refers to the Legation's Despatch No. 751 concerning the property at Bucharest of Mrs. Franklin Mott Gunther.

Mrs. Gunther called at the Department on January 13, 1949 and requested that the Legation be assured of her confidence in Madame N. and of her wish that property in Madame N.'s custody remain there, without any effort to inspect or inventory it, or anything else being done which might result in complications for Madame N. with the local authorities.

With respect to furniture and furnishings in the R. house, Mrs. Gunther is satisfied to have the articles remain where they are, for use by the two British ladies who occupy the quarters. She is in concurrence with the suggestion that an inventory of these items be attached to the lease, if this can be accomplished without any risk of adverse results to the individuals concerned. Mrs. Gunther suggested that Madame N.'s opinion might be sought on this point. If such an

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The names of the people referred to who remained in Rumania had been deleted from the various State Department documents introduced in evidence.

inventory is made, a copy would be sent to the Department for transmission to Mrs. Gunther.

The house referred to in the last paragraph of the above-quoted letter had been requisitioned by the Rumanian authorities prior to October 7, 1948, but the British had succeeded in having this procedure rescinded sometime before December 9, 1948, which rescission was to be effective for the period in which the British inhabitants referred to continued to occupy the house.

In a communication from Daniel Page, Administrative Officer of the American Mission at Bucharest to the State Department, dated December 9, 1948, it was stated, inter alia, that "Under present customs laws and controls it is uncertain as to whether or not the Rumanian authorities would grant the necessary approvals to ship Mrs. Gunther's effects to the United States."

A press release from the State Department dated March 17, 1949, read in part as follows:

In response to a note from the Rumanian Foreign Office requesting the Department to inform American nationals affected by the Rumanian nationalization law of June 11, 1948, that they should apply for compensation in accordance with certain procedures established by the Rumanian Government, the American Legation in Bucharest informed the Rumanian authorities that the compensation provisions envisaged by the Rumanian Government could not be considered to provide prompt, adequate or effective compensation and that therefore the United States Government did not intend to advise American nationals to conform with Rumanian procedures.

After petitioner's contact with the State Department on January 13, 1949, referred to in the above-quoted letter from a State Department official to the Officer in Charge of the U. S. Mission in Bucharest, she took no other steps to recover her property or to obtain compensation for its loss until she received a communication from the State Department in 1956, advising her to present a claim to the Foreign Claims Settlement Commission. On September 27, 1956, petitioner filed her claim in the amount of \$255,716.66. Subsequently, petitioner's claim was amended to include additional items and to readjust the value of other items previously claimed so that the claim as finally submitted amounted to \$295,716.50. In an exhibit attached to her claim petitioner included a statement of the conditions and circumstances under which her property was lost. Although this exhibit contained no declaration concerning the taking of her property specifically, it cited 8 decrees or regulations enacted by the Communist government in Rumania between April 24, 1945, and July 27, 1951, all providing for the confiscation of private property of certain classes of people; e.g., political enemies (April 24, 1945), Rumanians who had lost citizenship (July 7, 1948), and persons convicted of certain political crimes (August 12, 1950). The exhibit refers particularly to Decree No. III, dated July 27, 1951, "regarding the

regulation of goods of all kinds to be confiscated, or already confiscated, without inheritors or 'without a master,' as well as goods which no longer serve government agencies" which stated in part:

Sec. 1. The goods which are under the provisions of this decree are the following:

* * * * *

d) Goods 'without a master' as well as those considered abandoned by the effect of certain laws or decrees.

Considered as goods 'without a master' are goods of all kinds abandoned for one year by their owners--known or unknown--as well as goods found and remitted to the Militia units, which have not been claimed by their owner in three months' time from the remittance.

Petitioner's statement then characterizes the basis of her claim as follows:

It is therefore quite apparent that the applicant's property, as enumerated herein, has been confiscated by the Rumanian government. Certainly, the so-called "legal basis" for such a confiscation existed in any of the innumerable decrees conveniently dictated by the Rumanian government to suit its needs at any given instance. * * *

The final decision of the Foreign Claims Settlement Commission dated June 8, 1959, stated in pertinent part as follows:

ORDERED * * * The Commission finds that claimant owned certain personal property which was taken without compensation by the Government of Rumania during 1947. The Commission further finds that the value of the property taken was \$103,445.00 and concludes that claimant is entitled to an award under Section 303(2) of the Act.

AWARD

Pursuant to the provisions of the International Claims Settlement Act of 1949, as amended, an award is hereby made to LOUISA BRONSON GUNTHER in the amount of One Hundred Three Thousand Four Hundred Forty-Five Dollars (\$103,445.00) plus interest thereon at the rate of 6% per annum from July 1, 1947 to August 9, 1955, the effective date of the Act, in the amount of Fifty Thousand Three Hundred Eight Dollars and Seventy-Four Cents (\$50,308.74).

Payment of any part of this award shall not be construed to have divested the claimant herein, or the Government of the United States on her behalf, of any rights against the Government of Rumania for the unpaid balance of the claim, if any.

Pursuant to this award petitioner received in 1959 a payment of \$33,782.40 of which \$10,395.95 was paid out by petitioner as attorney's fees and other expenses with respect to the claim.

The entire \$33,782.40 represented payment of principal of the award, and no part of it represented accrued interest.

The fund from which this payment was made was the same 22 million dollars of Rumanian assets which had been held by the United States for the satisfaction of such claims. The Rumanian funds were not sufficient to satisfy in full the claims for which awards were made.

Late in 1959 it was anticipated that the Rumanian government would agree to augment this fund by \$2,500,000, which it agreed to do on March 30, 1960, in five installments to be paid between July 1, 1960, and July 1, 1964. In 1959 it did not appear likely that petitioner's award would be

satisfied in full by later payments, or even that she would receive further payments in any substantial amount. In 1960 petitioner received an additional payment of \$870.78 as a further payment under the award, and received no further payment in that year or any subsequent year.

All of the property owned by petitioner in Rumania was confiscated by Communist officials in that country proceeding under color of law after the year 1946 and before the year 1952.

Petitioner's basis in the property confiscated in Rumania⁴ was at least equal to the amount of her partial recovery from the Foreign Claims Settlement Commission, which was \$23,386.45 net of petitioner's expenses in prosecuting the claim.

On her tax return for 1959 petitioner claimed as a loss the difference between the \$295,716.50 stated in her claim filed with the Foreign Claims Settlement Commission and the award thereunder of \$103,445.00 or an amount of \$192,271.50. The respondent in his notice of deficiency dated June 12, 1962, determined that the deduction for the claimed loss

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Petitioner's basis in this property is its cost in the case of items originally purchased by her and fair market value at the time of the death of petitioner's husband in the case of items purchased by her husband which passed to petitioner under her husband's will. Sections 1012, 1014, I.R.C. 1954.

of \$192,271.50 was "not allowable under any section of the Internal Revenue Code," and further that petitioner failed to report as long-term capital gain her net award from the Foreign Claims Settlement Commission of \$23,386.45 received in 1959.

OPINION

KERN, Judge: It is the position of the petitioner herein that certain of her property was left in Rumania in 1947 with friends who were opposed to the Communist regime in that country, that this property was thereafter confiscated by agents of the Communist regime, and that such seizure was in violation of Rumanian law and thus constituted a "theft" deductible under section 165(c)(3) of the Internal Revenue Code.⁵ Petitioner further contends

⁵

All Code references are to the Internal Revenue Code of 1954, unless otherwise indicated.

SEC. 165(c). Limitation on Losses of Individuals.--In the case of an individual, the deduction under subsection (a) shall be limited to--

* * * * *

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. A loss described in this paragraph shall be allowed only to the extent that the amount of loss to such individual arising from each casualty, or from each theft, exceeds \$100. For purposes of the \$100 limitation of the preceding sentence, a husband and wife making a joint return under section 6013 for the taxable year in which the loss is allowed as a deduction

(continued)

that from 1947 until 1959 she had a reasonable expectation of either recovering her property or receiving compensation therefor out of the proceeds of some 22 million dollars of Rumanian assets held by the United States in 1947 and that her loss did not become certain until 1959, in which year petitioner was "awarded" by the Foreign Claims Settlement Commission the principal sum of \$103,445.00 plus interest as compensation for the loss of this property, upon which she actually received a payment of only \$33,782.40. Of this, \$10,395.95 was paid by petitioner for legal and other expenses related to the claim.⁶

The testimony of petitioner and her witnesses, who were former Rumanian nationals and who had suffered persecution by the Communist regime in that country, was highly charged with emotion. While we sympathize with the indignation which they so eloquently and, at times, vociferously expressed,

Footnote 5--continued

shall be treated as one individual. No loss described in this paragraph shall be allowed if, at the time of filing the return, such loss has been claimed for estate tax purposes in the estate tax return.

6

Petitioner deducted in her return for 1959 as a loss the difference between the claim of \$295,716.50 and the "award" of \$103,445.00, or \$192,271.50, and made the same claim in her petition. Petitioner on brief claims that the amount of the deduction should be the difference between \$295,716.50 and the net amount received, \$23,386.45, or \$272,330.05, although she failed to amend her petition to reflect this increased claim.

their testimony has not been so clear that we can feel certain as to who did what, and when, to petitioner's property in Rumania after 1945. However, on the whole record, we have concluded that all of the property left in Rumania by petitioner was seized or confiscated by agents of the Communist-controlled government of Rumania between 1947 and 1951, and that such seizures or confiscations were under color of decrees issued by that government. Of one thing we are certain, and that is that petitioner has not proved the contrary.

Accordingly, our opinion in William J. Powers, 36 T.C. 1191, is controlling and on its authority we conclude that petitioner has failed to prove that respondent erred in his determination that petitioner was not entitled to the claimed deduction.

We point out that our decision in William J. Powers, supra, is in all ways consistent with the "Act of State" doctrine exemplified by Underhill v. Hernandez, 168 U.S. 250; Oetjen v. Central Leather Co., 246 U.S. 297; and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, which would appear to preclude us from deciding that an act of a foreign government or of a revolutionary regime later recognized as a foreign government was a "theft" regardless of how despotic or arbitrary such an act might be.

The close relationship between these "Act of State" cases and the Powers case was recognized by petitioner's counsel in the first of many motions for continuance filed by him in which he stated as his ground for continuance that the case of Banco National de Cuba v. Sabbatino then pending before the Supreme Court was "controlling on the issue of whether 'nationalization' is a 'theft'" for the purpose of a deduction for theft loss, and that the district court decision therein, affirmed by the circuit court "supersedes the holding of such cases as [Powers]." The Supreme Court reversed. Banco National de Cuba v. Sabbatino, supra, reversing 307 F. 2d 845.

If there could have been any doubt that Congress did not intend by section 165(c)(3), supra, to allow a theft deduction to taxpayers on account of a loss of personal property confiscated under color of law by a foreign government "arbitrary and despotic as it may have been," we think that doubt was removed in 1964 when Congress found it necessary to enact special legislation adding section 165(i) to the Internal Revenue Code in order that certain expropriation by the Cuban government might be deemed

casualties or thefts and thus deductible for tax purposes.⁷

In view of our conclusions expressed above, we need not discuss the alternative arguments of the respondent supporting his disallowance of the deduction claimed.

In addition to the disallowance of the deduction the respondent also determined that the net proceeds received by petitioner from the Foreign Claims Settlement Commission (\$23,386.45) were taxable to petitioner as long-term capital gains because, he contends, her basis in the property lost was zero. Respondent's argument is to the effect that most or all of the property lost was originally owned by Franklin Gunther and passed to petitioner under his will, that no evidence was adduced herein relative to the fair market value of his property at the time of his death, December 22, 1941, and that therefore the basis of

⁷
SEC. 165(1). Certain Property Confiscated by the Government of Cuba.--

(1) Treatment as Subsection (c)(3) Loss.--For purposes of this chapter, in the case of an individual who was a citizen of the United States, or a resident alien, on December 31, 1958, any loss of property which--

(A) was sustained by reason of the expropriation, intervention, seizure, or similar taking of the property, before January 1, 1964, by the government of Cuba, any political subdivision thereof, or any agency or instrumentality of the foregoing, and

(B) was not a loss described in paragraph (1) or (2) of subsection (c),

shall be treated as a loss to which paragraph (3) of subsection (c) applies. * * *

The close relationship between these "Act of State" cases and the Powers case was recognized by petitioner's counsel in the first of many motions for continuance filed by him in which he stated as his ground for continuance that the case of Banco National de Cuba v. Sabbatino then pending before the Supreme Court was "controlling on the issue of whether 'nationalization' is a 'theft'" for the purpose of a deduction for theft loss, and that the district court decision therein, affirmed by the circuit court "supersedes the holding of such cases as [Powers]." The Supreme Court reversed. Banco National de Cuba v. Sabbatino, supra, reversing 307 F. 2d 845.

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7

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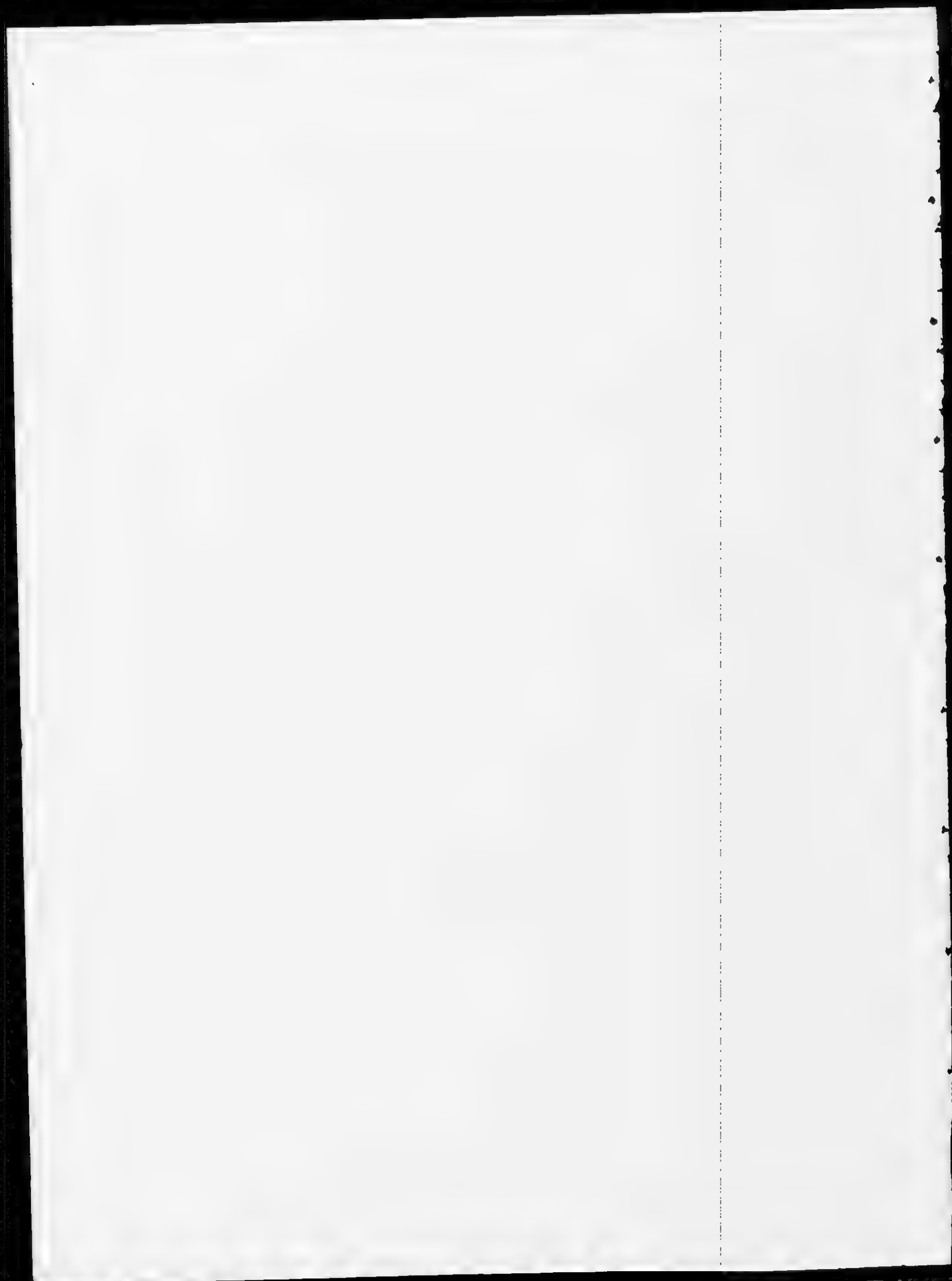
(A) was sustained by reason of the expropriation, intervention, seizure, or similar taking of the property, before January 1, 1964, by the government of Cuba, any political subdivision thereof, or any agency or instrumentality of the foregoing, and

(B) was not a loss described in paragraph (1) or (2) of subsection (c),

shall be treated as a loss to which paragraph (3) of subsection (c) applies. * * *

the property in petitioner's hands must be zero. However, on the entire record, we have no difficulty in finding that petitioner's basis in the property lost was at least equal to the net amount of her recovery. Accordingly, we decide this issue for the petitioner.

Decision will be entered
under Rule 50.



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,080

LOUISA GUNTHER FARCASANU

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE

Appellee.

*Appeal From The Tax Court
Of The United States*

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED

JAN 2 1970

*Noted
J. T. Fairson*

Bartholomew B. Coyne
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Attorneys for Appellant



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*Appeal From The Tax Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction is vested in this Court pursuant to the provisions of
Section 7482, 1954 I.R.C.

REFERENCE TO RULING

Written decision of the Tax Court of the United States, dated
January 15, 1969.

STATEMENT OF ISSUES PRESENTED*

The Tax Court of the United States erred in denying a theft or other casualty loss deduction for personal property used by the United States Minister to Romania to furnish the Legation and Residence in Bucharest where such property was seized, stolen or confiscated from his widow by or with the connivance of the communist government of Romania. The Tax Court held that it was restrained by the Act-of-State Doctrine set out in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) from passing on the legal consequences of such seizure, theft or confiscation by the Romanian authorities. The *Sabbatino* case has never been applied to purely domestic litigation, to wit, a tax suit between a taxpayer and the Commissioner of Internal Revenue. Nor, by its express terms, does *Sabbatino* apply to a clear breach of an express treaty obligation, to wit Article 24 of the Peace Treaty between Romania and the United States, which provides for the restitution of, or compensation for property of American citizens (or United Nations nationals). Nor has *Sabbatino* ever been applied to breaches of diplomatic immunity which universally attaches to the personal property of an ambassador or minister and his wife.

STATEMENT OF THE CASE

This is an appeal from a decision of the Tax Court of the United States entered January 15, 1969, sustaining a determination by the appellee Commissioner of Internal Revenue that the seizure of certain personal property owned by the appellant in Romania did not constitute a theft or other casualty loss within the purview of Section 23(e) (3), 26 U.S. Code, 1946 ed., Section 165(c) (3), 1954 I.R.C. The total principal amount of the tax involved is \$42,075.47.

The appellant is the widow of Franklin Mott Gunther, who was

*This case has not previously been before this Court.

appointed in 1937 as Minister Plenipotentiary to Romania. At the time of his appointment, Mr. Gunther was directed by the then Secretary of State, Cordell Hull, to furnish the United States Legation, including the Minister's office and residence in Bucharest, in a suitable manner with furniture, rugs, paintings, objects d'arts, etc.; because Bucharest was an important listening post in 1937 (J.A. 45). Since no public funds were available for that purpose (J.A. 46), the furnishings were procured by the appellant Minister Gunther at their own expense.¹ The United States Government agreed to pay for the return shipment of the said personalty at the termination of Minister Gunther's term of office (J.A. 46).

War on the United States was declared by Romania on December 11, 1941 and 11 days later Franklin M. Gunther, while serving as Minister from the United States to Romania, died of leukemia in Bucharest, where he was buried and his body still remains there. Within 30 days appellant boarded a special train provided by Romania to take American diplomats and citizens out of the country. There was neither time nor facility for taking her substantial amount of personal property out; consequently the latter was packed in clearly identified containers, (J.A. 58) marked as the property of the widow of the United States Minister to Romania and stored in the basement of the United States Chancery building in Bucharest which was placed under the diplomatic protection of the government of Switzerland for the duration of World War II. Other parts of the property of appellant were placed with friends living in Romania and in addition a few paintings were left in the Toma Setlian Museum in Bucharest.²

¹ A list of the personalty used and the cost thereof was introduced in evidence by appellant without objection by the appellee. (J.A. 76-86; 45). 49, T. 1-17).

² The will of the deceased Franklin M. Gunther, probated in Florida bequeathed all the deceased's personalty in Romania to the appellant.

In September, 1944, under an armistice signed between Romania and the Allies, Romania withdrew from the war and was placed under the limited control of an Allied Commission. In early 1945, Soviet forces, the only Allied troops in Romania, in collaboration with Romania communists, succeeded in establishing a political regime in control of the government of Romania. This new regime was dominated by communists and operated without regard to the constitutional safeguards of the Romanian Constitution which had been enacted in 1923 and was not repealed until April, 1948, (J.A. 63), when it was replaced by the Constitution of the Romanian Peoples Republic. The 1923 Constitution guaranteed the right to own personal property free from confiscation (Title 11, Art. 15, Pet. Ex. 14A, J.A. 90; J.A. 62, 63).³ The Romanian Peoples Constitution, established in April, 1948, likewise guaranteed the freedom to own personal property free from confiscation (Title 11, Art. 8, Pet. Ex. 16, J.A. 101).

The Tax Court found that the appellant's personal property was seized or confiscated in Romania between the years 1947 and 1951 by agents of the Romanian government.

ARGUMENT

An American taxpayer is entitled to a loss deduction under the tax laws as a theft or other casualty loss for property which was seized, stolen or confiscated by the communist government of Romania. The Act-of-State Doctrine, as recently enunciated by the United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, (1964), has no application to the determination of this case, or, alternatively, if *Sabbatino* does apply, then by its very terms the Act-of-State Doctrine does not preclude the Tax

³The 1923 Romanian Constitution was the basis of the 1932 Romanian Penal Code (J.A. 63).

Court of the United States from passing on the tax consequences within the United States of the seizure, theft or confiscation of property in Romania in violation of specific provisions of the peace treaty between the United States and Romania.

1. *The seizure, theft or confiscation of personal property belonging to the widow of the United States Minister to Romania gives rise under the tax laws to a deduction for theft or other casualty loss.*

Franklin M. Gunther was duly appointed in 1937 as Minister Plenipotentiary from the United States to Romania, and as such his personal property as well as that of his wife and staff were inviolable from seizure under international law. *Farnsworth v. Zerbst*, 98 F.2d 541, 544 (C.C.A. 5); American Law Institute, Restatement, Foreign Relations Law of the United States, Section 73. The diplomatic status of the personal property of the appellant, including that inherited from Franklin M. Gunther, continued for as long as she lacked reasonable opportunity to remove the said personalty from Romania. *Dupont v. Pichon*, 4 U.S. 321; Restatement, *op. cit. supra*, Section 80.

Franklin M. Gunther died in Bucharest, Romania on December 22, 1941 after a terrible illness that inflicted great pain and suffering upon his widow, and a few days after war was declared between the United States and Romania. The personalty of the deceased Minister and the appellant were hurriedly packed in cases and barrels and left for the duration of World War II in the United States Chancery building in Bucharest. A few cases of articles were left with friends and a few pictures were left in the Toma Setlian Museum in Bucharest.

The appellant returned to Bucharest in November, 1945 and found her personalty in the places she had left it. (J.A. 60), but because of the chaos existing in Romania upon her return she was unable to ship the personalty to the United States (J.A. 47, 48). In

early 1946, the appellant was required, against her wishes, to remove her personalty from the United States Chancery building because the space was needed for government purposes. The storage cases and barrels were distributed for safekeeping among friends of the appellant.

The chaos continued in Romania. Appellant was advised by both the head of the United States Diplomatic Mission and a high official of the Romanian government not to attempt to remove her personalty from Romania. Early in 1947, appellant left Romania to return to the United States because of the fatal illness of her mother who died shortly after appellant's return. Appellant, subsequent to her return to the United States was unable to send anyone to look for personalty in Romania (J.A. 56).

When the functions of a member of a diplomatic staff come to an end, it is a clearly established principle of international law that the staff member be given a reasonable period of time to arrange his affairs. *Dupont v. Pichon*, 4 U.S. 321; what constitutes a reasonable time depends on the circumstances. In the event of an armed conflict, or if the affairs of the mission itself have to be wound up, it may well be an appreciable length of time, Hardy, *Modern Diplomatic Law* (1968), p. 82. In the case of a death of a member of a mission, the members of his family continue to enjoy "the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country." *Id.* at p. 83.

From the foregoing, it is apparent that the appellant was unable to remove her personalty from Romania and that when it was seized in that country it continued to retain its diplomatic status. *Dupont v. Pichon*, *supra*. The seizure of the appellant's property was therefore unlawful under international law. *Farnsworth v. Zerbst*, *supra*.

Not only was the seizure of appellant's property unlawful under international law, but such seizure constituted a theft under Romanian law as well. As was shown *supra*, p. 4, the 1923 Romanian Constitution, as well as the 1948 Romanian Peoples Republic Constitution guaranteed the freedom to own personal property free from confiscation, and these rights were guaranteed equally to foreign residents as to Romanian citizens. (Title 11, Art. 9, Pet. Ex. 14A, J.A. 89).

Since it has already been demonstrated, *supra* p. 4, that confiscation was forbidden by Romanian law, and that the appellant's property was clearly marked as property belonging to a member of the United States Mission, it follows that the seizure of appellant's property violated, and constituted a theft under the Romanian Penal Code, (Articles 524, 525, 529, 531, Rom. Penal Code Codification 1936-37, Pet. Ex. 15A, J.A. 98, 99, 100). Article 524 states as follows: "He who takes a movable thing not belonging to him, from the possession or custody of another without the consent of same and with the purpose to unlawfully appropriate it is perpetrating the misdemeanor (offense) of theft. Article 529 states: "He who takes by violence or threat, a movable thing, not belonging to him, from the possession or custody of another with the purpose of unlawfully (without right) appropriating it, is perpetrating the misdemeanor (delict) of robbery."

The seizure of appellant's property clearly comes within the meaning of "theft" as contemplated by the provisions of Section 165(c) (3), 1954 I.R.C., since "theft" is not a technical term but a word of general and broad connotation covering any criminal appropriation of the property of another. 5 Merten's Law of Federal Income Taxation, Section 28.59, Rev. Ed. (1963), p. 241, f.n. 21.

2. *The Act-of-State Doctrine, as enunciated in the Sabbatino case, has no application to the administration of Federal Tax Laws, and in particular is inapplicable to the legal characterization, under Federal Tax Laws, of the seizure, theft, or confiscation of American owned property abroad.*

The determination of the international validity of a foreign seizure or expropriation of property is placed beyond the normal exercise of the judicial power of the United States because it was said in *Underhill v. Hernandez*, 168 U.S. 250, at 252, "... the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." This doctrine was re-affirmed at length in the *Sabbatino* case, 376 U.S. 398, at 428: "Therefore, rather than laying down or re-affirming an inflexible and all encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." The reasons given by the Supreme Court relate essentially to a judicial disinclination to render pronouncements on the validity of titles to property in a manner that would embarrass or complicate the conduct of foreign relations by the Executive Branch or give rise to "... the probability of affront to another state". *Id.* at p. 432.

The Act-of-State Doctrine of the *Sabbatino* case is not applicable to the federal tax laws of the United States and in particular does not prevent the proper legal characterization of acts of a foreign government in seizing or confiscating property abroad, since such a legal characterization has consequences only in the United States and does not have any consequences whatever in Romania or in any other country. The characterization of for-

eign acts for purposes of the administration of United States tax laws solely concern the determination of the legal relationships between the government of the United States and an American taxpayer. They do not, therefore, in any way involve "Judicial determination of invalidity of title." *Id.* at p. 431. They can have no such consequences as rendering "... uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade". *Id.* at p. 433. In the *Sabbatino* case itself the question at issue related to the dollar proceeds from the sale of sugar as between various contending groups, including the government of Cuba. Here, in a tax case, the only contending groups are the American taxpayer and the American government.

3. *Assuming, arguendo, that the Sabbatino case applies in the federal tax field, the Act-of-State Doctrine therein enunciated by its specific term does not apply to seizures or confiscations in violation of specific treaty provisions, and seizures, theft, or confiscation of American-owned property in communist Romania was in specific violation of Article 24 of the Peace Treaty between the United States and Romania.*

By its own terms, the doctrine of *Sabbatino*, *supra*, is not applicable where the legal principles are embodied in "... a treaty or other unambiguous agreement regarding controlling legal principles." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, at 428. Under Article 24 of the Peace Treaty with Romania (J. Ex. 5E. J.A. 26, 27, 28), it was expressly provided that United Nations nationals, which of course included appellant as an American citizen, and in particular as the widow of the American minister to Romania, were entitled to the restitution of their property confiscated or otherwise seized or damaged in Romania, or in the alternative to compensation. This is not a case where the seizure of the property of appellant is governed by customary international law, as was the case in *Sabbatino*. The seizure of appellant's personal property was in direct con-

travention of a multilateral treaty binding on both Romania and the United States.

The courts of the United States therefore not only have the power but the duty to determine the consequences in the United States of breaches of that treaty insofar as the American taxpayer is concerned without the slightest limitation by *Sabbatino*.

Aside from the peace treaty, it is a universal rule of international law, championed as strongly by communist states as by others, that the personal property of foreign diplomats is immune from seizure by the government or authorities of the receiving state. The diplomatic immunity of property of diplomatic representatives in a foreign country has been recognized since the very inception of international law and is openly proclaimed by all members of the international community, communist as well as non-communist. This law has been recently codified in the Vienna Convention on Diplomatic Missions (1961) which contains the following provisions:

"ARTICLE 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

ARTICLE 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 - (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission.

- (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraph (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

ARTICLE 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

ARTICLE 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post, or, if already in its territory from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on

expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable time in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission."

The *Sabbatino* case has been given a restrictive interpretation by both the Congress and the courts. It retained its precedent standing for Cuban confiscations for only a short while for the Congress effectively reversed the holding as to the specific parties by the so-called Hickenlooper amendment, 22 U.S.C., Section 2370 (e) (2) (1964), which provides:

"Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party, including a foreign state, (or party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of

that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

While the specific date of January 1, 1959, renders Section 2370 (c) (2) inapplicable to the facts of this appeal, the legislation is cited to show the impaired authority of *Sabbatino* as a pronouncement of judicial restraint in the international law field.

CONCLUSION

For the reasons hereinabove set forth, it is urgent that the judgment herein of the Tax Court of the United States be reversed, and that this case be remanded to that Court for further proceedings not inconsistent with the ruling herein.

Respectfully submitted,

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No. 23,080

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

LOUISA B. GUNTHER FARCASANU,

Appellant

COMMISSIONER OF INTERNAL REVENUE,

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ON APPEAL FROM THE DECISION OF THE

TAX COURT OF THE UNITED STATES

BRIEF FOR THE APPELLER

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United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 23 1970

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IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 23,080

LOUISA B. GUNTHER FARCASANU,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES PRESENTED

1. Whether the taking of taxpayer's^{1/} property by officials of the Rumanian Government under color of Rumanian law constituted a "theft" under Section 165(c) of the Internal Revenue Code of 1954.

2. Whether taxpayer, who has failed to offer any evidence as to the year in which her property was confiscated, or that the Tax Court erred in finding that this occurred no later than 1951, is entitled to a theft loss deduction in 1959.

^{1/} Appellant is referred to herein as "taxpayer".

This case has not previously been before this Court.

REFERENCES TO RULINGS

This appeal involves federal income taxes for the year 1959 in the amount of \$41,922.08. (Op. 1a.)^{2/} The Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency on June 12, 1962. (Op. 15.) In its opinion of September 17, 1968, 50 T.C. 881, the Tax Court sustained the Commissioner's determination of deficiency involved in this appeal. The court's decision was entered on January 15, 1969. (J A 8.)^{3/} Taxpayer filed a timely appeal from that decision on April 15, 1969. (J A 8). Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

^{2/} "Op." refers to the opinion of the Tax Court below, which is reproduced as Exhibit A to the Joint Appendix of the parties.

^{3/} "JA" refers to the Joint Appendix of the parties.

STATEMENT OF THE CASE

The relevant facts as found by the Tax Court, some of which were stipulated, are as follows:

Taxpayer resided in Washington, D. C., during the calendar year 1959 and at the time of the filing of the petition herein with the Tax Court. Her federal income tax return for 1959 was filed with the District Director of Internal Revenue at Baltimore, Maryland. (Op. 2.)

Taxpayer married Franklin M. Gunther, then a U. S. foreign service officer, in England in 1918^{4/}. After serving in the foreign service in various capacities and in various countries Franklin Gunther resigned from the foreign service in 1930 or 1931. Although between 1931 and 1937 he was associated in some way with an investment firm, he devoted most of his time, talents and money to other interests, among which was his collection of Persian and oriental art objects, a lifetime interest of his which was shared by taxpayer. (Op. 2-3.)

Franklin Gunther was appointed United States Minister Plenipotentiary to Rumania in 1937. Taxpayer and her husband moved to Bucharest, Rumania, in that year, taking with them not only their collections of rare and valuable art objects, but also furniture, paintings, oriental rugs, glassware, china, silverware and other personal property sufficient to

^{4/} Taxpayer married Mihail Farcasanu sometime after the filing of her petition in this case, over 20 years after the death of Franklin Gunther. At the time Franklin Gunther became American Minister to Rumania, Mihail Farcasanu was a prominent lawyer, journalist and political figure in Rumania. He escaped from Rumania in 1946 and is now a resident of Georgetown, Washington, D. C. (Op. 2.)

appropriately and elegantly furnish the residence formerly occupied by the United States Minister to Rumania who had preceded Franklin Gunther in office, and later, a large residence which Gunther himself leased. This personal property, most of which belonged to Franklin Gunther, was shipped to Rumania at the expense of the U. S. State Department in two steel vans from Washington, D. C. In addition to the property shipped from this country to Rumania, taxpayer purchased curtains, linens and other household effects while in England and Italy, en route to Bucharest. (Op. 3.)

Franklin Gunther was stricken by leukemia in the fall of 1941 and died on December 22, 1941. Just prior to his death, on December 11, 1941, Rumania declared war on the United States. It then became necessary for the American Legation to be closed and for the American officials connected with the Legation to withdraw from Rumania. For this purpose the Rumanian government arranged a special train to transport American officials and their families out of the country in January of 1942. It was not possible for taxpayer to remove the body of her husband from the country, nor did the circumstances of her departure allow her to take any more of the Gunther property located in Rumania than she could carry with her. Before leaving Bucharest taxpayer packed most of the belongings owned by her and her husband and placed them in an air raid shelter of the United States Chancellery building, which was to be supervised by the Swiss Legation. Other parts of the property were placed by taxpayer with friends in Rumania. In addition, a few paintings by Rumanian artists which were owned by the Gunthers were left in the Toma Setlian Museum in Bucharest. Taxpayer arrived in the United States early in 1942. (Op. 3-4.)

All of the property in Rumania owned by Franklin Gunther at the time of his death was bequeathed to taxpayer by his will, which was admitted to probate in the Court of the County Judge, Leon County, Florida.

(Op. 4.)

An armistice was signed between Rumania and the Allies (the Soviet Union, Great Britain and the United States) on September 12, 1944, under which Rumania withdrew from the war as an ally of Germany and agreed to enter on the side of the Allied Powers against Germany. Under the armistice the Allied High Command, which was controlled by the Soviet Union and purportedly acted on behalf of all of the Allied Nations, was given extensive powers over, inter alia, "the printing, importation and distribution in Rumania of periodical and non-periodical literature, the presentation of theatrical performances and films, the work of wireless stations, post, telegraph and telephone" as well as control over the Rumanian civil administration "for the purpose of securing the execution of [the] armistice terms." By March of 1945 the Soviet Union, the only Allied Power with troops in Rumania, in collaboration with Rumanian Communists had succeeded, by a show of force, in establishing a political regime in control of the government of Rumania which was dominated by Communists and which operated without regard to constitutional safeguards even though the constitution of Rumania which had been in existence since 1923 had not formally been abrogated and even though Rumania's King Michael remained the nominal head of the government. (Op. 4-5.)

During and after 1945 this regime dominated by Russian and Rumanian Communists issued numerous edicts, decrees or proclamations, dealing with such matters as confiscation of private property under certain circumstances and restrictions relative to the renting of private housing accommodations. For example, a decree was issued on April 24, 1945, providing for the confiscation of property of political enemies of the Rumanian government. During 1945 and 1946 there was widespread taking of property, arrests, and other intimidating and repressive acts on the part of the Communists in Rumania affecting "unfriendly" Rumanians. (Op. 5-6.)

In 1946 the United States and Great Britain formally recognized the Communist regime in Rumania in the hope or expectation that free elections would be held. The repressive tactics of the Communists subsided after this recognition. In the fall of 1947 elections were held in Rumania and the Communist candidates were announced as victors despite the strong protests of the United States and Great Britain that the results had been falsified. In December of 1947 Communist troops surrounded the Rumanian royal palace and King Michael was forced to abdicate. In 1948 the Rumanian Constitution of 1923 was replaced by the Constitution of the Rumanian People's Republic. (Op. 6.)

Taxpayer returned to Bucharest in November of 1945. Shortly after her arrival she ascertained to her satisfaction that the properties she had left in the U. S. Chancellery building, with friends, and at the museum were intact, although she did not unpack the crated goods to examine them. (Op. 6.)

An administrative officer of the American Mission in Bucharest in-^{5/}formed taxpayer early in 1946 that her property stored in the air raid shelter of the Chancellery building, authority over which had been re-assumed by the United States from the Swiss, would have to be moved in order that the shelter could again be used by the American diplomats in the conduct of their official duties. Thereupon, taxpayer arranged for these belongings to be moved into the residences of three or four friends in Bucharest. Either the same or another official of the American Mission attempted to determine from taxpayer whether or not she wanted her property and the body of her husband returned to the United States, but no definite decision was made by her at that time. Taxpayer was advised by one friend who retained a position of nominal prominence in the Rumanian Ministry of Foreign Affairs that because of the political instability and disorders then existing in Rumania she should not attempt to remove her property from the country, at least until the signing of a formal peace treaty. During 1946, affairs in Rumania were in chaos with armed bands attacking houses, stopping trains and perpetrating many robberies. Taxpayer was advised by the head of the American diplomatic Mission in Bucharest, who later became Minister to Rumania after the signing of a treaty of peace between Rumania and the United States, that she should not attempt to remove her property from Rumania at that time. Taxpayer wished to leave Rumania in 1946, but was persuaded by the head of the American Mission to

^{5/} Apparently the United States was represented in Rumania by the U. S. Mission in Bucharest from 1944 until after 1947, at which time a minister was appointed and the Mission resumed the status of a Legation. (Op. 7.)

stay on because of her close friendship with the mother of the King of Rumania and her connections with the royal family which made it possible for her to obtain information from the palace which was of value to the American Mission. Taxpayer remained in Rumania until early in 1947, at which time she hurriedly returned to the United States after being informed that her mother had suffered a stroke in the United States. Her mother died later in the year. Taxpayer took with her only such of her personal property as could be taken with her on her airplane flight. Taxpayer never returned to Rumania after 1947, and never saw any of the property she had left there after that time. (Op. 7-8.)

At some time in 1947 a member of the American Diplomatic Mission was able to arrange for the shipment of a "lift van" of his own household furnishings from Rumania to the United States without damage. At or about the same time personal property of another American official which had been packed and left in Rumania in 1942 was shipped out of Rumania and was damaged in transit. (Op. 8.)

After returning from Rumania to the United States early in 1947, taxpayer was advised by her brother-in-law, Ray Atherton, a distinguished American diplomatist who had served as Minister to Bulgaria when Franklin Gunther was Minister to Rumania, that a peace treaty between Rumania and the Allies would soon be consummated, that this would facilitate the recovery of her property, and that if her property were not returned to her, provision would be made under the treaty for compensation for individuals in her situation out of blocked Rumanian funds held by the

United States since 1940 in the amount of some 22 million dollars, which would be used to satisfy claimants against Rumania. The treaty of peace with Rumania, which became effective on September 15, 1947, contained provision for the compensation of U. S. nationals for property loss or damage suffered at the hands of the Rumanian government between September 1, 1939 and the effective date of the treaty. (Op. 9.)

On October 8, 1948, the following telegram was sent by an American official in Bucharest to the State Department (Op. 9-10):

Informed that Rumanian Government has requisitioned house containing certain property said to belong to Mrs. Franklin Mott Gunther, 2812 N Street N W Washington, widow of former U. S. Minister Bucharest.

Department may wish ascertain owners wishes concerning disposition this property. If desired, Legation will endeavor afford protection and assist in any other way possible.

Following correspondence between State Department officials and taxpayer and between the State Department and its representatives in Bucharest, Francis Flaherty, then acting as Assistant Chief of the Division of Protective Services of the Department of State, sent the following communication to the Officer in Charge of the American Mission, Bucharest, on January 19, 1949^{6/} (Op. 10-11):

The Secretary of State refers to the Legation's Despatch No. 751 concerning the property at Bucharest of Mrs. Franklin Mott Gunther.

^{6/} The names of the people referred to who remained in Rumania had been deleted from the various State Department documents introduced in evidence. (Op. 10.)

Mrs. Gunther called at the Department on January 13, 1949 and requested that the Legation be assured of her confidence in Madame N. and of her wish that property in Madame N.'s custody remain there, without any effort to inspect or inventory it, or anything else being done which might result in complications for Madame N. with the local authorities.

With respect to furniture and furnishings in the R. house, Mrs. Gunther is satisfied to have the articles remain where they are, for use by the two British ladies who occupy the quarters. She is in concurrence with the suggestion that an inventory of these items be attached to the lease, if this can be accomplished without any risk of adverse results to the individuals concerned. Mrs. Gunther suggested that Madame N.'s opinion might be sought on this point. If such an inventory is made, a copy would be sent to the Department for transmission to Mrs. Gunther.

The house referred to in the last paragraph of the above-quoted letter had been requisitioned by the Rumanian authorities prior to October 7, 1948, but the British had succeeded in having this procedure rescinded sometime before December 9, 1948, which rescission was to be effective for the period in which the British inhabitants referred to continued to occupy the house. (Op. 11.)

In a communication from Daniel Page, Administrative Officer of the American Mission at Bucharest to the State Department, dated December 9, 1948, it was stated, inter alia, that "Under present customs laws and controls it is uncertain as to whether or not the Rumanian authorities would grant the necessary approvals to ship Mrs. Gunther's effects to the United States." (Op. 11.)

A press release from the State Department dated March 17, 1949, read in part as follows (Op. 11):

In response to a note from the Rumanian Foreign Office requesting the Department to inform American nationals affected by the Rumanian nationalization law of June 11, 1948, that they should apply for compensation in accordance with certain procedures established by the Rumanian Government, the American Legation in Bucharest informed the Rumanian authorities that the compensation provisions envisaged by the Rumanian Government could not be considered to provide prompt, adequate or effective compensation and that therefore the United States Government did not intend to advise American nationals to conform with Rumanian procedures.

After taxpayer's contact with the State Department on January 13, 1949, referred to in the above-quoted letter from a State Department official to the Officer in Charge of the U. S. Mission in Bucharest, she took no other steps to recover her property or to obtain compensation for its loss until she received a communication from the State Department in 1956, advising her to present a claim to the Foreign Claims Settlement Commission. On September 27, 1956, taxpayer filed her claim in the amount of \$255,716.66. Subsequently, taxpayer's claim was amended to include additional items and to readjust the value of other items previously claimed so that the claim as finally submitted amounted to \$295,716.50. In an exhibit attached to her claim taxpayer included a statement of the conditions and circumstances under which her property was lost. Although this exhibit contained no declaration concerning the taking of her property specifically, it cited 8 decrees or regulations enacted by the Communist government in Rumania between

April 24, 1945, and July 27, 1951, all providing for the confiscation of private property of certain classes of people; e.g., political enemies (April 24, 1945), Rumanians who had lost citizenship (July 7, 1948), and persons convicted of certain political crimes (August 12, 1950). (Op. 12.) The exhibit refers particularly to Decree No. III, dated July 27, 1951, "regarding the regulation of goods of all kinds to be confiscated, or already confiscated, without inheritors or 'without a master,' as well as goods which no longer serve government agencies" which stated in part (Op. 13):

Sec. 1. The goods which are under the provisions of this decree are the following:

*

*

*

d) Goods 'without a master' as well as those considered abandoned by the effect of certain laws or decrees.

Considered as goods 'without a master' are goods of all kinds abandoned for one year by their owners--known or unknown--as well as goods found and remitted to the Militia units, which have not been claimed by their owner in three months' time from the remittance.

Taxpayer's statement then characterizes the basis of her claim as follows (Op. 13):

It is therefore quite apparent that the applicant's property, as enumerated herein, has been confiscated by the Rumanian government. Certainly, the so-called "legal basis" for such a confiscation existed in any of the innumerable decrees conveniently dictated by the Rumanian government to suit its needs at any given instance. * * *

The final decision of the Foreign Claims Settlement Commission dated June 8, 1959, stated in pertinent part as follows (Op. 13-14):

ORDERED * * * The Commission finds that claimant owned certain personal property which was taken without compensation by the Government of Rumania during 1947. The Commission further finds that the value of the property taken was \$103,445.00 and concludes that claimant is entitled to an award under Section 303(2) of the Act.

AWARD

Pursuant to the provisions of the International Claims Settlement Act of 1949, as amended, an award is hereby made to LOUISA BRONSON GUNTHER in the amount of One Hundred Three Thousand Four Hundred Forty-Five Dollars (\$103,445.00) plus interest thereon at the rate of 6% per annum from July 1, 1947 to August 9, 1955, the effective date of the Act, in the amount of Fifty Thousand Three Hundred Eight Dollars and Seventy-Four Cents (\$50,308.74).

Payment of any part of this award shall not be construed to have divested the claimant herein, or the Government of the United States on her behalf, of any rights against the Government of Rumania for the unpaid balance of the claim, if any.

Pursuant to this award taxpayer received in 1959 a payment of \$33,782.40 of which \$10,395.95 was paid out by taxpayer as attorney's fees and other expenses with respect to the claim. (Op. 14.)

The entire \$33,782.40 represented payment of principal of the award, and no part of it represented accrued interest. (Op. 14.)

The fund from which this payment was made was the same 22 million dollars of Rumanian assets which had been held by the United States for the satisfaction of such claims. The Rumanian funds were not sufficient to satisfy in full the claims for which awards were made. (Op. 14.)

Late in 1959 it was anticipated that the Rumanian government would agree to augment this fund by \$2,500,000, which it agreed to do on March 30, 1960, in five installments to be paid between July 1, 1960, and July 1, 1964. In 1959 it did not appear likely that taxpayer's award would be satisfied in full by later payments, or even that she would receive further payments in any substantial amount. In 1960 taxpayer received an additional payment of \$370.78 as a further payment under the award, and received no further payment in that year or any subsequent year. (Op. 14-15.)

All of the property owned by taxpayer in Rumania was confiscated by Communist officials in that country proceeding under color of law after the year 1946 and before the year 1952. (Op. 15.)

Taxpayer's basis in the property confiscated in Rumania^{7/} was at least equal to the amount of her partial recovery from the Foreign Claims Settlement Commission, which was \$23,386.45 net of taxpayer's expenses in prosecuting the claim. (Op. 15.)

On her tax return for 1959 taxpayer claimed as a loss the difference between the \$295,716.50 stated in her claim filed with the Foreign Claims Settlement Commission and the award thereunder of \$103,445.00 or an amount of \$192,271.50. The Commissioner in his notice of deficiency dated June 12, 1962, determined inter alia that the deduction for the claimed loss of \$192,271.50 was "not allowable under any section of the

^{7/} Taxpayer's basis in this property is its cost in the case of items originally purchased by her and fair market value at the time of the death of taxpayer's husband in the case of items purchased by her husband which passed to taxpayer under her husband's will. Sections 1012, 1014, Internal Revenue Code of 1954. (Op. 15.)

Internal Revenue Code", and further that taxpayer failed to report as long-term capital gain her net award from the Foreign Claims Settlement Commission of \$23,386.45 received in 1959. (Op. 15-16.)

SUMMARY OF ARGUMENT

Section 165(c) of the 1954 Code provides a deduction for losses of individuals "arising * * * from theft". Taxpayer here does not challenge the Tax Court's findings that her property was confiscated in the years 1947-1951 by officials of the Rumanian Communist Government under color of Rumanian law. Although her contention that the taking of her property under such circumstances constituted a "theft" has not been often advanced, in the few instances in which the courts have been called upon to express a view, it has been consistently in accord with that taken by the court below, in part upon the strength of prior authorities. The taxpayer, on the other hand, cites no authority in support of her untenable construction.

Taxpayer concentrates primarily upon an attempt to show that the taking of her property by the Rumanian Communist Government was wrongful under international or Rumanian law. Yet Section 165(c) provides a deduction only for "theft", and taxpayer has not sustained her burden of showing by clear and convincing evidence that the taking of her property was a "theft" under Rumanian or international law. Taxpayer's assumption (without citation of authority) that a taking of her property which is later proved to be wrongful under Rumanian or international law constitutes a "theft" is completely without merit. Criminal intent, a requisite element of theft, is the very antithesis of the taking of property by officials of a government under color of its laws.

Congress has amply demonstrated that its intent and understanding is that the term "theft" in Section 165(c) does not cover a seizure by a foreign government. Section 165(i) of the Code, which specifically allows deductions by individual taxpayers of losses due to Cuban confiscations, was enacted in 1964. The legislative history of that bill unequivocally shows that, other than as provided in Section 165(i), individual losses due to confiscations by foreign governments are not deductible. The Treasury Department's practice has always been to disallow losses due to confiscations by foreign governments under Section 165(c) and its predecessor statutes, and it has twice ruled formally to that effect. Such long-standing administrative practice, along with its Congressional recognition and acquiescence, should not at this late date be disturbed.

Further support is found for the construction of the Tax Court that confiscations by foreign governments are not "thefts" in the so-called "act of state" doctrine--a self-imposed policy of the federal judiciary under which the courts decline to render a holding that the acts of an existing foreign government were illegal. This doctrine was in effect at the time Congress originally enacted the provision for theft loss deductions. It must be presumed that Congress was aware of the doctrine and the impediment it would represent (over and above the fact that governmental confiscations are not customarily regarded as thefts) to a deduction by a taxpayer as a "theft" of losses resulting from confiscations of property by a foreign government, or its agents. Had Congress wished to provide a deduction for losses from confiscations by foreign governments, it would surely have recognized the need to make some provision therefor other than through the

improbable characterization of such acts as "thefts". Indeed, Congress did enact special legislation, Section 165(i), when it wished to provide a deduction for losses from confiscations by the Cuban government.

Finally, taxpayer is not entitled to a theft loss deduction in her taxable year 1959, when she received partial compensation for her loss from the Foreign Claims Settlement Commission. Under the Treasury Regulations, taxpayer must deduct her loss in the year she discovered the loss, or the year when she received compensation for the loss if there existed a "reasonable prospect" of recovery when the loss was sustained or discovered. Taxpayer has utterly failed to sustain her burden of proving that she had a "reasonable prospect" of recovery when she sustained or discovered her loss. Indeed, she produced no evidence at all as to when she discovered her loss. The Tax Court found that taxpayer's property was confiscated in 1951 at the latest, but the Foreign Claims Settlement Act was not even amended to provide for claims arising from Rumanian losses until 1955. The numerous authorities have consistently held that, at a time when there is no existing statutory provision for compensation by the United States for property which a particular foreign government has confiscated, a taxpayer's mere belief that the United States may someday see fit to compensate him constitutes only a hope or expectation, not the requisite "reasonable prospect" of recovery sufficient to delay deduction of the loss until the year when the Claims Commission grants compensation.

ARGUMENT

THE TAX COURT DID NOT ERR IN HOLDING THAT THE TAXPAYER
WAS NOT ENTITLED TO DEDUCT AS A THEFT LOSS IN 1959
THE AMOUNT OF HER LOSS RESULTING FROM CONFISCATION
OF HER PROPERTY BY THE RUMANIAN GOVERNMENT

A. The confiscation of taxpayer's property
by officials of the Rumanian government
under color of Rumanian law was not a
"theft" under Section 165(c) of the
1954 Code

Section 165(a) of the Internal Revenue Code of 1954, Appendix, infra, provides a deduction for "any loss sustained * * * not compensated for by insurance or otherwise." However, Section 165(c)(3), Appendix, infra, provides a "Limitation on Losses of Individuals," stating that "In the case of an individual, the deduction * * * shall be limited to * * * losses aris[ing] * * * from theft." The burden of proving the elements of a deductible loss is on the taxpayer. Burnet v. Houston, 283 U.S. 223, 227. Since Section 165(c)(3) makes explicit reference to losses "from theft," the burden is on the taxpayer to show that the loss arose from theft and not from some other cause. See Allen v. Commissioner, 16 T.C. 163, 166-167; cf. Kemper v. Commissioner, 269 F. 2d 184 (C.A. 8th).

The Tax Court ruled, in essence, that a taking of property by the de facto government of a political state under color of law is not a "theft" within the meaning of Section 165(c). It relied upon its own earlier ruling in Powers v. Commissioner, 36 T.C. 1191 (see also Rev. Rul. 62-197, 1962-2 Cum. Bull. 66, and Weinmann v. United States, 278 F. 2d 474 (C.A. 2d)) and observed that "all of the property left in Rumania by * * * [taxpayer] was seized or confiscated by agents of the Communist-controlled

government of Rumania between 1947 and 1951, and that such seizures or confiscations were under color of decrees issued by that government." The court added: "Of one thing we are certain, and that is that * * * [taxpayer] has not proved the contrary." (Op. 18.) In support of this conclusion, the Tax Court found that the Soviet Union and Rumanian Communists established a political regime in control of the government of Rumania by March, 1945, and that government operated without regard to constitutional safeguards. (Op. 5.) It found that during and after 1945 this regime issued numerous edicts, decrees or proclamations dealing with such matters as confiscation of private property under certain circumstances and restrictions relative to the renting of private housing accommodations. (Op. 5-6.) The court cited as an example a decree issued on April 24, 1945, providing for the confiscation of property of political enemies of the Rumanian government. (Op. 6, 12.)

The Tax Court also found that taxpayer herself cited this and seven other decrees or regulations enacted by the Communist government in Rumania between 1945 and 1951 in support of her 1956 claim to the Foreign Claims Settlement Commission for \$295,716.50, as reimbursement for the property in question which was taken by the Rumanian government. (Op. 12.) The court noted that all of these regulations provided for the confiscation of the private property of certain classes of people, e.g., political enemies (April 24, 1945), Rumanians who had lost citizenship (July 7, 1948), and persons convicted of certain political crimes (August 12, 1950). (Op. 12.) It found that taxpayer's claim to the Commission referred particularly to Decree No. III, dated July 27, 1951, "regarding the regulation of goods of all kinds to be confiscated,

or already confiscated, without inheritors or 'without a master,' as well as goods which no longer serve government agencies ". (Op. 12-13.)^{8/}
The Tax Court summarized the basis of taxpayer's claim to the Foreign Claims Settlement Commission by quoting the following excerpt from taxpayer's claim (Op. 13):

It is therefore quite apparent that the applicant's property, as enumerated herein, has been confiscated by the Rumanian government. Certainly, the so-called "legal basis" for such a confiscation existed in any of the innumerable decrees conveniently dictated by the Rumanian government to suit its needs at any given instance. * * *

Taxpayer apparently does not dispute these findings of the Tax Court relating to the issuance of the Communist decrees, the taking of taxpayer's property pursuant thereto, and taxpayer's reliance on these regulations as the basis for her claim for restitution from the Foreign Claims Settlement Commission. These findings are without question supported by substantial evidence and must therefore be upheld on appeal. Commissioner v. Duberstein, 363 U.S. 278, 289-291; 1954 Code, Section 7482, Appendix, infra; Federal Rules of Civil Procedure, Rule 52(a).

^{8/} The pertinent provisions of the Decree, as quoted by the Tax Court (Op. 13), are as follows:

Sec. 1. The goods which are under the provisions of this decree are the following:

- * * *
- d) Goods 'without a master' as well as those considered abandoned by the effect of certain laws or decrees.
Considered as goods 'without a master' are goods of all kinds abandoned for one year by their owners--known or unknown--as well as goods found and remitted to the Militia units, which have not been claimed by their owner in three months' time from the remittance.

On brief in this Court, taxpayer concentrates primarily upon an attempt to show that the taking by the Rumanian Communist Government was wrongful--i.e., in violation of Rumanian law or international law. Assuming, arguendo, that this is so,^{9/} it cannot avail the taxpayer, since Section 165(c) provides a deduction only for the loss from a "theft"--not from any taking of property contrary to law (whether domestic, Rumanian or international).^{10/} This taxpayer herself appears to acknowledge when she argues (Br. ^{11/}7) that "Not only was the seizure of appellant's [taxpayer's] property unlawful under international law, but such seizure constituted a theft under Romanian law as well." However, her effort (Br. 7) to show why it should be regarded as a theft is totally without merit. "The taxpayer has the burden of showing 'by clear and convincing proof' that the local law supports his contentions." Bonney v. Commissioner, 247 F. 2d 237, 239 (C.A. 2d), certiorari denied, 355 U.S. 923; see Helvering v. Fitch, 309 U.S. 149, 156; Helvering v. Leonard, 310 U.S. 80, 86.

^{9/} Although we maintain that taxpayer has failed even to show that the property was covered by diplomatic immunity at the time seized (she has also failed to show when this occurred), it is irrelevant in any event since a violation of such immunity is not an act of criminal theft and taxpayer has made no effort to show that it is.

^{10/} However, as the Supreme Court observed in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-429:

There are few if any issues in international law today on which opinion seems to be so divided as the limitation on a state's power to expropriate the property of aliens.

^{11/} Page references to the brief of taxpayer are to her typewritten brief filed in this Court, since the printed briefs of the parties are being filed simultaneously.

Largely, taxpayer's position constitutes an arbitrary assumption (without citation of authority) that a taking of property by a government which is later determined to have been contrary to the law of that country is a fortiori a theft. Obviously this is not so, or every suit by an individual against a sovereign government for recovery of property alleged to have been taken without support in law, or in violation of some provision of law (constitutional or statutory), would constitute an allegation of theft, and every judicial holding in favor of the claimant would be, in effect, a ruling that the government had been guilty of a criminal ^{12/}act.

Taxpayer's reliance (Br. 7) upon the Rumanian Penal Code is equally meritless. It is noted that each of the quoted passages makes it an element of the crime that the taking be with the purpose to unlawfully appropriate the property. The fact that the taking may later be held ^{13/}unlawful does not supply the necessary element of an initial purpose to

^{12/} For example, Title 28 of the United States Code, Section 1346, gives jurisdiction to the District Courts over civil actions for the recovery of any tax alleged to have been illegally collected. On taxpayer's theory, each holding in such a refund suit that the collection was illegal and that the taxpayer was entitled to a refund is also a holding that the collection was a criminal theft. Presumably, if that were so, a taxpayer who could establish the collection as having been illegal, but who was held to be barred from recovery by the statute of limitations, would be entitled to take a theft loss deduction in the amount in question. We believe further comment on that unnecessary.

^{13/} The mere fact that the subsequent 1947 Treaty of Peace with Rumania, 61 Stat., Part 2, p. 1757 (JA 27-29) (see Taxpayer's Br. 9-10), required Rumania to return or compensate for all seized or damaged property does not constitute a ruling of law that the initial taking was even illegal--much less a theft--under Rumanian law. It is simply an application of the rule that the might of the victor makes right. The restitution would have been required no matter how clearly Rumanian law may have authorized the taking. Also, contrary to taxpayer's statement (Br. 9-10), the Treaty did not forbid the taking, which had already occurred. It merely required return or compensation.

act in an unlawful manner. That is the very heart of the ruling by the court below. Appropriation of property by the government of a political state under the color of law is the antithesis of a purpose to take it unlawfully and cannot be regarded as a criminal ^{14/}act.

It is well settled that to qualify as a loss under Section 165(c) of the Code, the taking must be a theft under the law of the situs where the theft took place, in this case, the law of Rumania. Edwards v. Bromberg, 232 F. 2d 107, 111 (C.A. 5th); Bonney v. Commissioner, 247 F. 2d 237, 239 (C.A. 2d), affirming, 24 T.C. 199, 241; Norton v. Commissioner, 333 F. 2d 1005, 1008 (C.A. 9th); Ungar v. Commissioner, 204 F. 2d 322 (C.A. 2d), affirming, 18 T.C. 688; Monteleoni v. Commissioner, 34 T.C. 688, 692; Dobyns-Taylor Hardware Co. v. United States, 278 F. Supp. 538 (E.D. Tenn.); Muncie v. Commissioner, 18 T.C. 849, 851; Estate of Campbell v. Commissioner, decided March 2, 1964 (P-H Memo T.C., par. 64,053, p. 443), affirmed per curiam, 343 F. 2d 462 (C.A. 2d). Regardless of technical variances in criminal laws from one jurisdiction to another, the courts have uniformly held that "criminal intent" must be shown in order to constitute theft under Section 165 of the Code. Edwards v. Bromberg, 232 F. 2d, p. 110; Johnson v. United States, 291 F. 2d 908 (C.A. 8th); Bodzy v. Commissioner,

^{14/} Taxpayer's reliance (Br. 7) upon the commentary in 5 Mertens, Law of Federal Income Taxation (Rev.), Section 28.59, constitutes little more than bootstrapping, since it merely indicates that "theft" covers any criminal appropriation of property. If we concede the requisite premise that the taking was a criminal act, there is no need to consult Mertens.

321 F. 2d 331, 335 (C.A. 5th); Schultz v. Commissioner, 30 T.C. 256, 271, reversed on other issues, 278 F. 2d 927 (C.A. 5th).

Here, as stated, the Tax Court's unchallenged finding was that taxpayer's property was seized or confiscated by Rumanian Communist officials pursuant to and under color of various decrees of the Communist government of Rumania. (Op. 18.) Taxpayer's contention that the Communist officials functioning pursuant to and under color of such decrees acted with "criminal intent" is inherently inconsistent and without any support in the record. Even under principles of American law, a public official does not violate the criminal law where he acts pursuant to a statute, even if the statute is later determined to be unconstitutional. Claybrook v. State, 161 Tenn. 440, 51 S.W. 2d 499; State v. Godwin, 123 N.C. 697, 31 S.E. 221, 222; see Field, The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officer for Action or Nonaction, 77 U. Pa. L. Rev. 155, 156-157 (1928). There is not a scintilla of evidence that any Rumanian court ever ruled that any seizures by Communist officials under the decrees and regulations pursuant to which her property was taken, or any similar regulations, were even illegal--much less criminal thefts.

In Weinmann v. United States, 278 F. 2d 474, 475-475, the Second Circuit noted that the provision for deduction of losses from theft did not apply to nationalization of a taxpayer's property by a foreign government.

In Powers v. Commissioner, 34 T.C. 1191, relied on by the Tax Court below, the court held that the confiscation of the automobile of an American citizen by East German Communist officials was not a theft under

Section 165 of the Code. The court in Powers cited Johnson v. United States, 291 F. 2d 908 (C.A. 8th), in which a taxpayer claimed a "theft" loss where a bank, upon prior approval of a state court, seized and sold his property in satisfaction of a debt. The Tax Court based its ruling on the statement in Johnson that (291 F. 2d, p. 909) "'losses * * * from theft' consist only of takings and deprivations in which the element of criminal intent has been involved." As we have shown, and as has been uniformly recognized, a seizure by a foreign government is not a "theft" since it is done under color of law and thus (even assuming, which we doubt, that a sovereign government is capable of it) without criminal intent.

Moreover, Congress has amply demonstrated that its intent and understanding is that the term "theft" in Section 165(c) does not cover a seizure by a foreign government. In 1964 Congress enacted what is now Section 165(1) of the 1954 Code, Appendix, infra, to allow individual taxpayers owning property in Cuba prior to 1959, which the Cuban government confiscated in that year or later, to deduct that loss as under Section 165(c) of the Code.

Section 165(1) was added as an amendment to the bill which was enacted as the Excise-Tax Rate Extension Act of 1964, P. L. 88-348, 78 Stat. 237, Section 3 (June 30, 1964)^{15/}. Senator Williams, the sponsor of the amendment, stated when he introduced it (110 Cong. Record, Part 11, pp. 15129, 15130 (June 25, 1964)):

^{15/} The statute was originally passed as part of the Revenue Act of 1964, P. L. 88-272, 78 Stat. 19, Sec. 238 (February 26, 1964). However, the statute was inadvertently made prospective only and this later amendment was designed to make it retroactive and make other technical changes. See
(continued)

Before the Revenue Act of 1964, the law provided that in the case of an individual, no loss deduction may be taken for expropriation or similar taking of property by a foreign government, if the property was not used in a trade or business or in the production of income. * * *

The Senate agreed to the amendment. (Ibid.) In explaining this Senate amendment to the House, Representative Mills, Chairman of the Ways and Means Committee, stated (110 Cong. Record, Part 12, p. 15472 (June 30, 1964)):

The one Senate amendment which the conferees on the part of the House accepted relates to certain expropriation losses in Cuba.

Before the passage of the Revenue Act of 1964, the law provided that in the case of an individual, no loss deduction could be taken for an expropriation or similar taking of property by a foreign government unless the property was used in a trade or business or in the production of income.

The other body in its consideration of the Revenue Act of 1964, however, added a provision which would have made a loss deduction available in the case of the expropriation by Cuba of non-business tangible property.

The amendment was passed by the House (110 Cong. Record, Part 12, p. 15473) and became the present Section 165(i). The legislative history of Section 165(i) thus shows a recognition by Congress that confiscations by foreign governments of the property of individuals were not generally deductible as losses since they did not constitute thefts within the meaning of that section.

15/ (continued)

H. Conference Rep. No. 1523, 88th Cong., 2d Sess., pp. 3-4 (1964-2 Cum. Bull. 677, 679); see also 110 Cong. Record, Part 11, pp. 15129-15130 (June 25, 1964) (Statement of Senator Williams, sponsor of the amendment).

The Treasury Department has consistently ruled that individual losses due to foreign confiscations are not deductible as thefts under Section 165 (c) or its predecessor statutes. Rev. Rul. 62-197, supra; I.T. 4086, 1952-1 Cum. Bull. 29, 30. These long-standing Treasury interpretations, along with Congress' express and implied acquiescence, should not now be disturbed. United States v. Leslie Salt Co., 350 U.S. 383, 396-397; Sheridan-Wyoming Coal Co. v. Helvering, 75 U.S. App. D.C. 166, 169, 125 F. 2d 42, 45 (1941); McDermott v. Commissioner, 80 U.S. App. D.C. 176, 179, 150 F.2d 585, 588 (1945). Taxpayer's loss due to the confiscation of her property by the Communist Rumanian government is not deductible under Code Section 165(c).

Further support is found for the construction of the Tax Court in the so-called "act of state" doctrine--a self-imposed policy of the federal judiciary under which the courts will decline to render a holding that the acts of an existing foreign government were illegal. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398; Underhill v. Hernandez, 168 U.S. 250; Ricaud v. American Metal Co., 246 U.S. 304; Oetjen v. Central Leather Co., 246 U.S. 297. In Sabbatino, the Supreme Court stated the rule to be that (376 U.S., p. 428):

* * * the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

This doctrine was in effect at the time the Congress originally enacted the provision for theft loss deduction now contained in Section 165(c)^{16/}. It must thus be presumed that the Congress was aware of this doctrine and the impediment it would represent (over and above the fact that governmental confiscations are not customarily regarded as thefts) to a deduction by a taxpayer as a "theft" of losses resulting from confiscations of property by a foreign government, or its agents. Clearly then, it did not intend or expect that such losses would, or could, be deducted under this provision. Had it wished to provide a deduction for losses from such causes, it would surely have recognized the need to make some provision therefor other than through the improbable characterization of such acts of foreign governments as "thefts". Indeed, as we have shown, when the Congress did wish to make such provision in the special case of losses from seizures by the Cuban government, it recognized the need for additional legislation to accomplish that purpose (Section 165 (i)) since such a confiscation was not a covered "theft" loss.

^{16/} The Court stated in Banco Nacional de Cuba v. Sabbatino, 376 U.S., p. 416:

The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674, Blad v. Bamfield, 3 Swans. 604, 36 Eng. Rep. 992, and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries, see, e. g., Ware v. Hylton, 3 Dall. 199, 230; Hudson v. Guestier, 4 Cranch 293, 294; The Schooner Exchange v. M'Faddon, 7 Cranch 116, 135, 136; L'Invincible, 1 Wheat, 238, 253; The Santissima Trinidad, 7 Wheat. 283, 336, is found in Underhill v. Hernandez, 168 U.S. 250 [1897] * * * .

The deduction for "Losses * * * from theft" first appeared in the Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 5, Fourth.

For these reasons, it is obvious that confiscations were never intended to be treated as "thefts" within the meaning of Section 165(c), and the decision below should be affirmed on this ground alone.

B. Taxpayer did not sustain her burden of proving that she was entitled to deduct her loss in the taxable year 1959

Since the Tax Court found that the confiscation of taxpayer's property was not a "theft" under Section 165(c)(3) of the Code, it did not go on to comment upon the further contention of the Commissioner below, that any loss suffered by taxpayer was, in any event, not deductible in the taxable year 1959.

The Tax Court's failure to decide this issue does not preclude this Court from doing so now. Even if the Tax Court gives the wrong reason for its decision, the Court of Appeals may affirm without remanding if the Tax Court reached the right result and taxpayer had full opportunity to develop the facts on the issue. Section 7482(c), 1954 Code, Appendix, infra. See, e.g., Family Record Plan, Inc. v. Commissioner, 309 F. 2d 208, 210 (C.A. 9th); Frank v. Commissioner, 321 F. 2d 143, 148 (C.A. 8th); Towers v. Commissioner, 247 F. 2d 233, 236 (C.A. 2d); Shepard v. Commissioner, 101 F. 2d 595, 598 (C.A. 7th). A fortiori, here taxpayer had full notice of the Commissioner's contention that she deducted the loss in the wrong tax year and had full opportunity to elicit all the evidence she had concerning this issue. Merely because the Tax Court did not decide the question one way or another should not preclude this Court from doing so, since the facts are clear and all that remains is to draw the proper legal conclusion from these facts.

Section 165(e) of the 1954 Code, Appendix, infra, provides that "any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss." Although the theft loss statute in the 1939 Code, Section 23(e), Appendix, infra, was phrased differently, the Supreme Court has also held that, under the 1939 Code, a theft loss can be taken in the year of discovery. Alison v. United States, 344 U.S. 167.

The burden of proving a deductible loss is on the taxpayer. Burnet v. Houston, 283 U.S. 223. Taxpayer also has the burden of proving the year in which the loss was sustained (James Petroleum Corp. v. Commissioner, 238 F. 2d 678, 680 (C.A. 2d), certiorari denied, 353 U.S. 910; Turner Construction Co. v. United States, 364 F. 2d 525, 530 (C.A. 2d); Scofield v. First Nat. Bank in Houston, 158 F. 2d 268, 271 (C.A. 5th), certiorari denied, 331 U.S. 806; Mine Hill & Schuylkill Haven R. Co. v. Smith, 184 F. 2d 422, 426 (C.A. 3d), certiorari denied, 340 U.S. 932; Hadley Falls Trust Co. v. United States, 110 F. 2d 887, 889 (C.A. 1st)) and the year when the loss was discovered (Botwinik Brothers of Mass., Inc. v. Commissioner, 39 T.C. 988, 998; see Spitzer v. Commissioner, decided August 28, 1959 (P-H Memo T.C., par. 59,171, p. 644)). The taxpayer need not establish that, in the year in which the deduction is properly taken, there is no possibility of eventual recoupment of any sort for the loss incurred. United States v. White Dental Co., 274 U.S. 398.

Here, taxpayer failed to present any evidence of when she discovered the confiscation of her property. An examination of the entire record shows that, at least as early as 1947, she must have been highly suspicious that her property had been confiscated, since she testified (JA 51-53), and the Tax Court found (Op. 9), that her brother-in-law, an American diplomat, told her at that time that she would be paid from blocked Rumanian assets if she did not recover her property. In 1949, she told the State Department to allow certain private citizens in Rumania to care for some of her property. (JA 52-54; Op. 10.) She then testified (JA 53):

Q. What happened after that, when you didn't get the property back?

A. I just waited because he [her brother-in-law] said, "Just wait and you will hear in time what decision they will come to."

The Tax Court found (Op. 12) that taxpayer thereafter "took no other steps to recover her property or to obtain compensation for its loss until she received a communication from the State Department in 1956, advising her to present a claim to the Foreign Claims Settlement Commission."

On September 27, 1956, in her claim before the Foreign Claims Settlement Commission, taxpayer stressed that Rumanian Decree No. 111 dated July 27, 1951, furnished the strongest basis for the confiscation of her property. (Op. 12-13; JA 40-41.) But the record is barren of facts as to how or when she found out about this decree or whether 1956 was the year in which she first discovered that her property had been confiscated.

Taxpayer apparently bases her claim for deducting the theft loss in the taxable year 1959 on Section 1.165-1(d)(3) of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra. The Regulation provides as to thefts:

* * * if in the year of discovery there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained * * * until the taxable year in which it can be ascertained with reasonable certainty whether or not such reimbursement will be received.

Taxpayer apparently would urge that she had a "reasonable prospect of recovery" because of the Government's retention of blocked Rumanian assets until 1956, when she filed her claim, and that she deducted her loss in 1959, pursuant to Section 1.165-1(d)(3) of the Treasury Regulations, supra, when she received only partial compensation from the Foreign Claims Settlement Commission.

The law is now well-settled that a taxpayer does not have a "reasonable prospect of recovery" of confiscated property merely because the United States possesses blocked assets of the confiscating country when the property is seized and may later grant some relief to persons whose property was confiscated. Schweitzer v. Commissioner, 376 F. 2d 30 (C.A. 3d), affirming decision of November 30, 1965 (P-H Memo T.C., par. 65,308) (Hungary); Estate of Fuchs v. Commissioner (C.A. 2d), decided June 27, 1969 (24 A.F.T.R. 2d 5077) (Czechoslovakia); Colish v. Commissioner, 48 T.C. 711, 715-716 (Czechoslovakia); Wajor v. Commissioner, decided April 14, 1969 (P-H Memo T.C., par. 69,069) (Hungary). Cf. Spitzer v. Commissioner (P-H Memo T.C., par. 59,171) (Yugoslavia). Although these cases were decided under Section 165(a) or the "casualty" provision of Section 165(c)

of the Code, they are controlling here, since the regulation under that subsection lays down the same "reasonable prospect of recovery" test as is contained in the regulation under Section 165(c) here. Compare Treasury Regulations, Section 1.165-1(d)(2), Appendix, infra, with Section 1.165-1(d)(3).

As in those cases, here the International Claims Settlement Act of 1949, c. 54, 64 Stat. 12, Appendix, infra, did not provide for payment of Rumanian claims. In fact, Section 4(a) of that Act, Appendix, infra, expressly prohibited claims against Rumania, declaring the jurisdiction of the International Claims Settlement Commission to be to--

render final decisions with respect to claims of the Government of the United States and of nationals of the United States included within the terms of the Yugoslav Claims Agreement of 1948, or included within the terms of any claims agreement hereafter concluded between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II) similarly providing for the * * * discharge of claims * * * arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof. * * *

(Emphasis added.)

S. Rep. No. 800, 81st Cong., 1st Sess., p. 12 (2 U.S.C. Cong. & Adm. News (1950) 1949, 1960) expressly excluded prospective agreements with "governments against which the United States declared the existence of a state of war during World War II" "such * * * as * * * Rumania * * *". The 1949 Act thus offered no reasonable prospect of future reparation to those in taxpayer's position. It follows that if any year prior to 1955 is the year in which taxpayer discovered her loss, no statute then existed under which

she could anticipate compensation, and she was bound to claim her loss in that year of initial discovery.

It is true that the International Claims Settlement Act of 1949 was amended in 1955 to permit claims to be filed for Rumanian losses. See Section 202, Appendix, infra. However, that taxpayer's subjective faith in the eventual vindication of her rights by her Government, and the fact that it may have eventually been rewarded is not sufficient. This was likewise the case in Estate of Fuchs, 24 A.F.T.R. 2d, p. 5078; Schweitzer, 376 F. 2d 30; Colish, 48 T.C., p. 717; and Major, P-H Memo T.C., par. 69,069, pp. 410-411. As in those cases, here the prospect, in the years following the confiscation and prior to 1955, that the United States might provide compensation to taxpayer was "nothing more than an expectancy or hope" (Colish v. Commissioner, 48 T.C., p. 718) and that is not sufficient under the regulation. The test is one of foresight and requires a showing that the decision to postpone, rather than to deduct, would be the decision rendered or made by one exercising ordinary care and prudence. Estate of Fuchs v. Commissioner, 24 A.F.T.R. 2d, pp. 5080-5081; Colish v. Commissioner, 48 T.C., pp. 716-718; Spitzer v. Commissioner, decided August 28, 1959 (P-H Memo T.C., par. 59,171, p. 644). This standard, now embodied in the two regulations, merely expresses a principle established under the 1939 Code by prior decisions. Parmelee Transportation Co. v. Commissioner, 351 F. 2d 619, 627-629 (Ct. Cl.); see Scofield's Estate v. Commissioner, 266 F. 2d 154, 159, 163 (C.A. 6th). And there can be no doubt that taxpayer has brought forth no legally sufficient reason--nothing more than a mere hope or expectancy--for delaying the taking of the alleged theft deduction. Reliance on the possibility of obtaining a

portion of the blocked Rumanian assets makes taxpayer the "incorrigible optimist" which the Supreme Court and other courts have said one may not be when his property is confiscated by a foreign country. United States v. White Dental Co., 274 U.S., p. 403. As the Tax Court stated in Spitzer v. Commissioner, P-H Memo T.C., par. 59,171, p. 644:

The evidence does not show that there was any expectation of recovery at the time the property was seized by Yugoslavia. Neither does the evidence show how or when any expectation of recovery developed. * * *

The evidence in the case is not sufficient to overcome the presumption of correctness of the Commissioner's determination to the effect that * * * [taxpayer's] loss, if any, did not occur in 1955 but occurred in some prior year.

In fact, the above cases are only part of the overwhelming weight of authority holding that taxpayers whose property was confiscated by Communist governments following World War II may not wait until they receive or think they will receive compensation from those governments or from the United States before they deduct their losses. See Elek v. Commissioner, 30 T.C. 731; Gulden v. United States, 278 F. Supp. 1019, 1021 (N.D. N.Y.); Solt v. Commissioner, 19 T.C. 183, 187; Alvary v. Commissioner, 302 F. 2d 790 (C.A. 2d); Pap v. Commissioner, decided April 10, 1962 (P-H Memo T.C., par. 62,082); Lajtha v. Commissioner, decided September 29, 1961 (P-H Memo T.C., par. 61,273); Daniel v. Commissioner, decided December 22, 1960 (P-H Memo T.C., par. 60,274); Laszlo v. Commissioner, decided May 4, 1962 (P-H Memo T.C., par. 62,111).

In conclusion, taxpayer has not sustained her burden of proving either the year in which she discovered the theft of her property or that, in that year, she had a "reasonable prospect of recovery"; accordingly, taxpayer is not entitled to deduct her alleged theft loss in 1959.

CONCLUSION

For the reasons stated, the decision of the Tax Court should be affirmed.

Respectfully submitted,

JOHNNIE M. WALTERS,
Assistant Attorney General,

LEE A. JACKSON,
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OCTOBER, 1969.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing copies thereof on this ____ day of January, 1970, in an envelope, with postage prepaid, properly addressed to him as follows:

Bartholomew B. Coyne, Esquire
927 15th Street, N.W.
Washington, D.C.

JOHNNIE M. WALTERS,
Assistant Attorney General

APPENDIX

Internal Revenue Code of 1954:

SEC. 165. LOSSES.

(a) General Rule.--There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

(b) Amount of Deduction.--For purposes of subsection (a), the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property.

(c) Limitation on Losses of Individuals.--In the case of an individual, the deduction under subsection (a) shall be limited to--

(1) losses incurred in a trade or business;

(2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. No loss described in this paragraph shall be allowed if, at the time of the filing of the return, such loss has been claimed for estate tax purposes in the estate tax return.

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(e) Theft Losses.--For purposes of subsection (a), any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.

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(1) [as amended by Sec. 3, Excise-Tax Rate Extension Act of 1964, P. L. 88-348, 78 Stat. 237]. Certain Property Confiscated by the Government of Cuba.--

(1) Treatment as subsection (c) (3) loss.--For purposes of this chapter, in the case of an individual who was a citizen of the United States, or a resident alien, on December 31, 1958, any loss of property which--

(A) was sustained by reason of the expropriation, intervention, seizure, or similar taking of the property, before January 1, 1964, by the government of Cuba, any political subdivision thereof, or any agency or instrumentality of the foregoing, and

(B) was not a loss described in paragraph (1) or (2) of subsection (c),

shall be treated as a loss to which paragraph (3) of subsection (c) applies. In the case of tangible property, the preceding sentence shall not apply unless the property was held by the taxpayer, and was located in Cuba, on December 31, 1958.

(2) Special rules.--

(A) For purposes of subsection (a), any loss described in paragraph (1) shall be treated as having been sustained on October 14, 1960, unless it is established that the loss was sustained on some other day.

(B) For purposes of subsection (a), the fair market value of property held by the taxpayer on December 31, 1958, to which paragraph (1) applies, on the day on which the loss of such property was sustained, shall be its fair market value on December 31, 1958.

(C) For purposes of section 172, a loss described in paragraph (1) shall not be treated as an expropriation loss within the meaning of section 172(k).

(D) For purposes of section 6601, the amount of any tax imposed by this title shall not be reduced by virtue of this subsection for any period prior to February 26, 1964.

(3) Refunds or credits.--Notwithstanding any law or rule of law, refund or credit of any overpayment attributable to the application of paragraph (1) may be made or allowed if claim therefor is filed before January 1, 1965. No interest shall be allowed with respect to any such refund or credit for any period prior to February 26, 1964.

SEC. 7482. COURTS OF REVIEW.

(a) Jurisdiction.--The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

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(c) Powers.--

(1) To affirm, modify, or reverse.--Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

(2) To make rules.--Rules for review of decisions of the Tax Court shall be those prescribed by the Supreme Court under section 2074 of title 28 of the United States Code. Until such rules become effective the rules adopted under authority of section 1141 (c) (2) of the Internal Revenue Code of 1939 shall remain in effect.

(3) To require additional security.--Nothing in section 7483 shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

(4) To impose damages.--The United States Court of Appeals and the Supreme Court shall have power to impose damages in any case where the decision of the Tax Court is affirmed and it appears that the petition was filed merely for delay.

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

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(e) Losses by Individuals.--In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise--

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. No loss shall be allowed as a deduction under this paragraph if at the time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

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(26 U.S.C. 1952 ed., Sec. 23.)

International Claims Settlement Act of 1949, c. 54, 64 Stat. 12:

Sec. 4 [as amended by Sec. 2, Act of August 9, 1955, c. 645, 69 Stat. 562]. (a) The Commission shall have jurisdiction to receive, examine, adjudicate, and render final decisions with respect to claims of the Government of the United States and of nationals of the United States included within the terms of the Yugoslav Claims Agreement of 1948, or included within the terms of any claims agreement hereafter concluded between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II) similarly providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof. In the decision of claims under this title, the Commission shall apply the following in the following order: (1) The provisions of the applicable claims agreement as provided in this subsection; and (2) the applicable principles of international law, justice, and equity.

(b) The Commission shall give public notice of the time when, and the limit of time within which, claims may be filed, which notice shall be published in the Federal Register. In addition, the Commission is authorized and directed to mail a similar notice to the last-known address of each person appearing in the records of the Department of State as having indicated an intention of filing a claim with respect to a matter concerning which the Commission has jurisdiction under this title. All decisions shall be upon such evidence and written legal contentions as may be presented within such period as may be prescribed therefor by the Commission, and upon the results of any independent investigation of cases which the Commission may deem it advisable to make. Each decision by the Commission pursuant to this title shall be by majority vote, and shall state the reason for such decision, and shall constitute a full and final disposition of the case in which the decision is rendered.

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(22 U.S.C. 1964 ed., Sec. 1623.)

Sec. 202 [as added by Sec. 3, Act of August 9, 1955, supra].
(a) In accordance with article 25 of the treaty of peace with Bulgaria, article 29 of the treaty of peace with Hungary, and article 27 of the treaty of peace with Rumania, any property which was blocked in accordance with Executive Order 8389 of April 10, 1940, as amended, and remains blocked on the effective date of this title, and which, as of September 15, 1947, was owned directly or indirectly by Bulgaria, Hungary, and Rumania or by any national thereof as defined in such Executive order, shall vest in such officer or agency as the President may from time to time designate, and shall vest when, as, and upon such terms as the President or his designee shall direct. Such property shall be sold or otherwise liquidated as expeditiously as possible after vesting under such rules and regulations as the President or his designee may prescribe. The net proceeds remaining upon completion of the administration and liquidation thereof, including the adjudication of any suits or claims with respect thereto under sections 207 and 208, shall be covered into the Treasury. * * *

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(22 U.S.C. 1964 ed., Sec. 1631a.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.165-1 Losses.

(d) Year of deduction. * * *

(2)(i) If a casualty or other event occurs which may result in a loss and, in the year of such casualty or event, there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained, for purposes of section 165, until it can be ascertained with reasonable certainty whether or not such reimbursement will be received. Whether a reasonable prospect of recovery exists with respect to a claim for reimbursement of a loss is a question of fact to be determined upon an examination of all facts and circumstances. Whether or not such reimbursement will be received may be ascertained with reasonable certainty, for example, by a settlement of the claim, by an adjudication of the claim, or by an abandonment of the claim. When a taxpayer claims that the taxable year in which a loss is sustained is fixed by his abandonment of the claim for reimbursement, he must be able to produce objective evidence of his having abandoned the claim, such as the execution of a release.

(ii) If in the year of the casualty or other event a portion of the loss is not covered by a claim for reimbursement with respect to which there is a reasonable prospect of recovery, then such portion of the loss is sustained during the taxable year in which the casualty or other event occurs. For example, if property having an adjusted basis of \$10,000 is completely destroyed by fire in 1961, and if the taxpayer's only claim for reimbursement consists of an insurance claim for \$8,000 which is settled in 1962, the taxpayer sustains a loss of \$2,000 in 1961. However, if the taxpayer's automobile is completely destroyed in 1961 as a result of the negligence of another person and there exists a reasonable prospect of recovery on a claim for the full value of the automobile against such person, the taxpayer does not sustain any loss until the taxable year in which the claim is adjudicated or otherwise settled. If the automobile had an adjusted basis of \$5,000 and the taxpayer secures a judgment of \$4,000 in 1962, \$1,000 is deductible for the taxable year 1962. If in 1963 it becomes reasonably certain that only \$3,500 can ever be collected on such judgment, \$500 is deductible for the taxable year 1963.

(iii) If the taxpayer deducted a loss in accordance with the provisions of this paragraph and in a subsequent taxable year receives reimbursement for such loss, he does not recompute the tax for the taxable year in which the deduction was taken but includes the amount of such reimbursement in his gross income for the taxable year in which received, subject to the provisions of section 111, relating to recovery of amounts previously deducted.

(3) Any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers the loss (see § 1.165-8, relating to theft losses). However, if in the year of discovery there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained, for purposes of section 165, until the taxable year in which it can be ascertained with reasonable certainty whether or not such reimbursement will be received.

(4) The rules of this paragraph are applicable with respect to a casualty or other event which may result in a loss and which occurs after January 16, 1960. If the casualty or other event occurs on or before such date, a taxpayer may treat any loss resulting therefrom in accordance with the rules then applicable, or, if he so desires, in accordance with the provisions of this paragraph; but no provision of this paragraph shall be construed to permit a deduction of the same loss or any part thereof in more than one taxable year or to extend the period of limitations within which a claim for credit or refund may be filed under section 6511.

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(26 C.F.R., Sec. 1.165-1.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,080

LOUISA GUNTHER FARCASANU
Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE
Appellee.

*Appeal From The Tax Court
Of The United States*

REPLY BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 22 1970

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Clifford J. Hynning
Attorneys for Appellant

Nathan J. Paulson
CLERK

(i)

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UNITED STATES COURT OF APPEALS
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ARGUMENT

The appellee deserves to be complimented on its detailed statement of the facts as recited by the Tax Court of the United States; however, the legal argument is entirely another matter; hence this reply.

The appellant relies here, as she did substantially in the Tax Court, on the following arguments in justifying here deduction of

\$192,271.50 on her income tax return for 1959 as (1) a loss for theft or other casualty; and (2) a loss incurred in the conduct of the trade or business of serving as this country's highest accredited diplomat to the Government of Rumania, serving in wartime.

1. Theft loss

A loss for "theft" under the Federal Income tax laws is not limited to "larceny" which is a technical word with a narrowly defined meaning: theft "... is, on the contrary, a word of general and broad connotation, intended to cover and covering any criminal appropriation of another's property to the use of the taker" 5 Mertin's, Law of Federal Income Taxation, § 28.59, n. 21. The record herein contains the detailed provisions of the Romanian Criminal Code on "theft", which reads as follows (J.A. 98, 99, 100).

"The Theft"

Art. 524:

He who takes a movable thing, not belonging to him, from the possession or custody of another without the consent of same and with the purpose of unlawfully appropriate it is perpetrating the misdemeanor (offense) of theft.

Art. 525:

The theft is qualified (i.e. with aggravated circumstances) in the following cases:

* * *

4. When it is perpetrated:

(a) through feigning (simulating) by the author (culprit) of an official quality or mission on behalf of an authority or of a public service;

(b) through the masking, disguising or travestizing of the infractor;

(c) by two or more persons;

(d) by an infractor who had on himself weapons or drugs, although not using them;

5. When it is perpetrated:

(a) by a public servant (public official) who is misusing his official quality.

The Robbery

Art. 529:

He who takes by violence or threat a movable thing, not belonging to him, from the possession or custody of another with the purpose of unlawfully (without right) appropriating it, is perpetrating the misdemeanor (delict) of robbery

Art. 531:

The robbery is punished with prison from 5 to 12 years . . . when it is perpetrated:

* * *

3. by two or more persons:

* * *

5. by one or more persons who had on them (all or some of them) weapons or drugs."

The same broad connotation or definition of "theft" is also given in the American Law Institute, Model Penal Code, Proposed Official Draft (May 4, 1962) p. 169, which reads as follows:

"Section 223.4. *Theft by Extortion*. A person is guilty of theft if he obtains property of another by threatening to:

(a) inflict bodily injury on anyone or commit any other criminal offense; or

- (b) accuse anyone of a criminal offense; or
- (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
- (d) take or withhold action as an official, or cause an official to take or withhold action; or
- (e) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or
- (f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (g) inflict any other harm which would not benefit the actor."

There can be no substantive difficulty in squaring the facts herein with the above definition of "theft." But appellee argues that this is entirely changed because in this case the property was allegedly confiscated by the Romanian state, and the state can do no wrong; especially, it cannot commit the crime of "theft". But are these the facts on the record? All that appellee can cite are numerous confiscatory enactments of Rumania, during the early communist period (1945 to 1946), but none of the language of these enactments applies to the seizure of the property of an American diplomat, or for that matter, of an American citizen. The property in question was clearly labelled as the property of the United States Legation, Bucharest. The record contains not a scintilla of evidence to show any order, judgment or decree issued by any Romanian authority against either appellant or her property. It necessarily follows that on this record there was no official confiscation or nationalization of her property by the Romanian state. There were takings by persons who may have purported to act under the color of authority of the Romanian state but their credentials cannot be verified

on this record. This is not the pattern of Communist confiscations where the Communists were in control of the government machinery. It was instead the seizures of property by raiding freebooters¹ who took advantage of the chaos and confusion of postwar Romania to appropriate appellant's property to their own use and gain. It was indeed "theft" in anybody's lexicon for which a loss deduction lies under the federal tax laws.

2. Losses incurred in trade or business

Appellant's husband was a professional diplomat² who, together with appellant, had transported at government expense a large supply of house furnishings including oriented carpets, and a considerable collection of Persian and oriental art objects for the suitable furnishing of the American Legation in Bucharest as well as the Ministerial residence. The inventory occupies some 11 pages of the record, Pet. Ex. 13, and includes such variegated objects as:

- Three 15th century large Italian Primitives
- An 18th century French painting
- A large Chinese painting, Sung Period
- Six early Chinese Roll paintings
- Japanese prints

¹The only evidence introduced by the appellant as to the manner in which her personal property was physically seized, was the testimony of Elena Bratianu (J.A. 56, 57, 58, 59), and Simon Rad, (J.A. 61, 62), who were eyewitnesses, and testified that the seizures took place in 1947. The appellee admits that the Tax Court erred in its finding (Op. 15) that the property was seized sometime between 1946 and 1952 by admitting in fn. 10, p. 22 that the appellant's loss had already occurred prior to the Treaty of Peace with Rumania (Joint Ex. 5-E), which was signed on February 15, 1947 and came into effect on September 15, 1947.

²Franklin M. Gunther's salary, as a government official, was business income. *McDonald v. C.I.R.*, 323 U.S. 57, 59 (1944). Affirming 139 F.2d 400, 401 (3 Cir.); cf: I.R.S. Cum. Bulletin, 1965, 65-125, No. 1, p. 88-90.

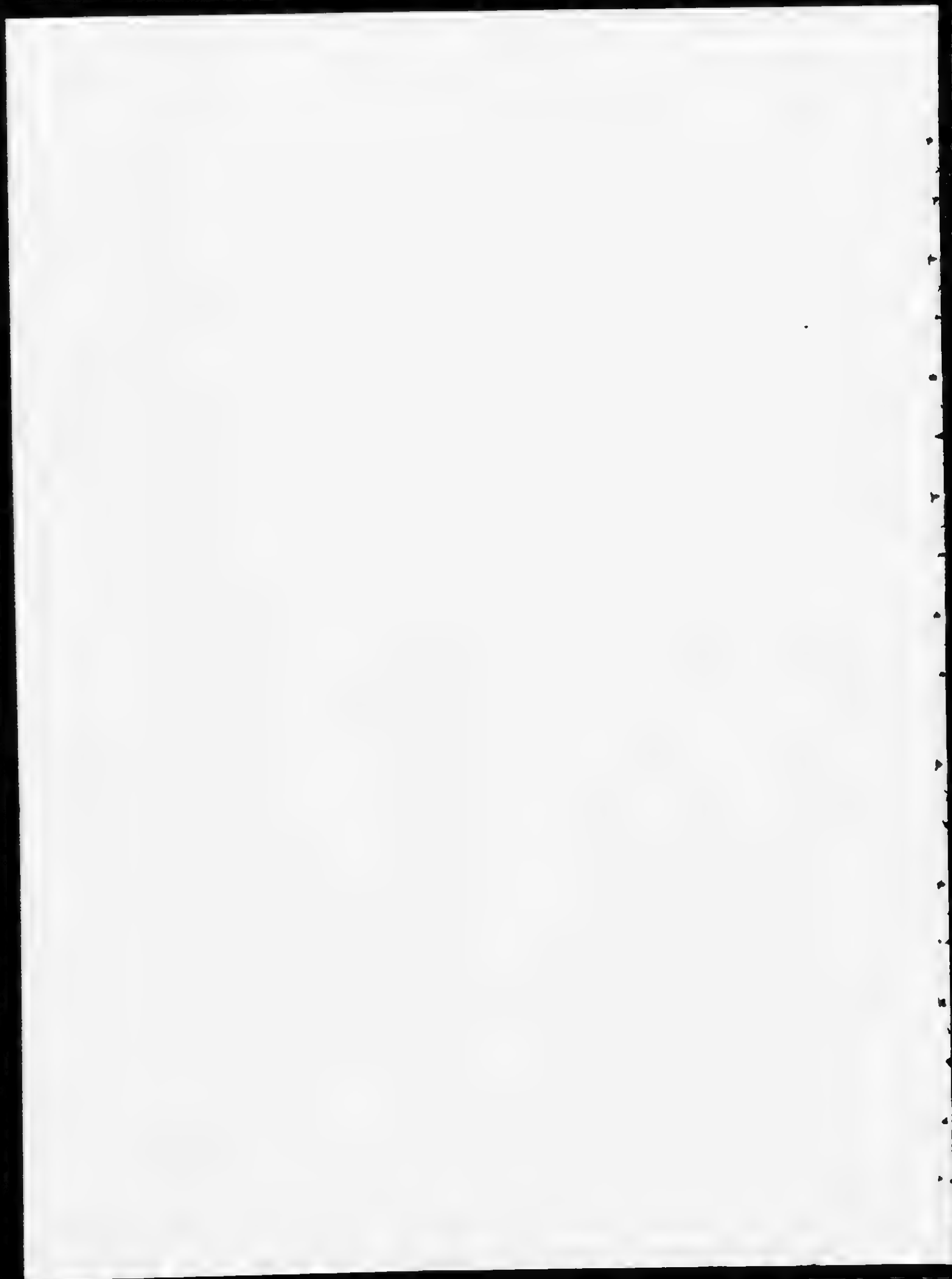
A large Ushak XVI century carpet
A silver Queen Anne tea service
Twenty-four Chippendale dining room chairs
Six XV century Italian armchairs
An XVII century Flemish tapestry
A bracket clock by Thomas Tompion
An Italian carved walnut Cassons chest, XVI century

The above items were brought into Romania at the request and order of the Government of the United States in order to enable appellant and her late husband to discharge their duties as diplomatic representatives of the United States (J.A. 45). This occurred in the days before the large embassies were acquired or built under the foreign building program of the Department of State (22 U.S.C. 295b), and before the State Department resources were available to circulate art collections and to send advisers on interior decorations to our missions abroad. This was done in the days when it was frankly expected that the head of mission would arrange the furnishings by himself, he being compensated only for costs of transportation of what he brought personally to the embassy or legation. If the opinion of the court below is allowed to stand, it means that the head of mission who complies with his government's request and order to furnish the legation does so entirely at his own peril in the foreign land; especially is this true herein, when the appellant and her husband represented this country during a period including the most terrible war known to Europe and the most far reaching revolution since the years of the religious wars when 1/3 of Europe was laid to waste. Clearly all the one hundred forty items in the inventory were deemed necessary to the proper discharge of the diplomatic functions of appellant's late husband. Any losses therein were consequently losses incurred by appellant in connection with the trade or business of the appellant's late husband. See 5 Merten's, *Law of Federal Income Taxation*, Section 28.31.

CONCLUSION

In closing, one must note with regret that the zeal of government counsel got the better of their judgment when they indulged in the remark that the Peace treaty with Rumania "... is simply an application of the rule that the might of the victor makes right." p. 22, fn. 2. Assuredly that cannot be the considered legal view of the Solicitor General or the Attorney General of the United States. Nor ought it be the view of their counsel.

Bartholomew B. Coyne
Clifford J. Hynning
Attorneys for Appellant



24-5

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

LOUISA GUNTHER FARCASANU,

APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE,

APPELLEE

NO. 23080

ON APPEAL FROM THE TAX COURT OF

UNITED STATES

PETITION FOR REHEARING

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 17 1970

Nathan J. Paulson
CLERK

Bartholomew B. Coyne

Clifford J. Hynning

Attorneys for Appellant

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ARGUMENT

This Court's opinion fully sets out the pertinent facts and therefore it is unnecessary to burden the Court with a repetition thereof.

It is the position of the appellant Louisa Gunther Farcasanu that this Court erred in affirming the decision of the Tax Court, and therefore appellant moves and petitions for a rehearing herein on the following grounds:

I.

The Opinion of the Court of Appeals based its decision of affirmance on the narrow grounds that its review of the findings of fact by the Tax Court "is strictly limited" (Slip Opinion, p. 5) and that the appellant had not discharged her burden of proof that the taking of her property in Rumania was a theft committed with criminal intent. The Court of Appeals wholly ignored the legal reasoning of the Court below that under the Sabbatino Case^{1/} the Tax Court was precluded from passing judgment on the legality or illegality of a taking of property in Rumania under color of governmental authority.

^{1/} Bane National de Cuba v. Sabbatino, 376 U.S. 398 (1964).

The major burden of appellant's brief on appeal was that this was a wholly improper invocation of the Sabbatino Doctrine, for reasons fully stated in the brief (p. 8). Plainly the Sabbatino doctrine does not absolve an American court from the responsibility of examining the legality or illegality of the taking of property under color of authority of a foreign state where the property had diplomatic immunity; the property here taken had, demonstrably, such immunity, namely, the property used by a high American diplomat who had died at his post. An American court exercising the judicial functions under the Constitution cannot escape its responsibility by invoking the Sabbatino doctrine in a tax dispute between an American taxpayer and the tax collector.

For the Appellate Court to say that it is bound by the findings of fact by the Tax Court where that Court specifically limited itself by the Sabbatino doctrine in making its findings of fact is a failure to discharge the appellate function of determining whether or not the Sabbatino case controls. If Sabbatino controls, then clearly the factual circumstance of this case falls within its stated exceptions.

"Therefore, rather than laying down or re-affirming an inflexible and all encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of

property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of such suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles even if the complaint alleges that the taking violates customary international law. (Emphasis supplied). Banco Nacional de Cuba v. Sabbatino, supra, at p. 428.

The seizure of appellant's property was a violation of a treaty between Rumania and the United States; furthermore, aside from that treaty, it is a universal rule of international law, in communist and non-communist countries, that the personal ty of foreign diplomats is immune from seizure by the government or authorities of the receiving state.

If Sabbatino is not controlling, then the Tax Court should be reversed for having reached a clearly erroneous conclusion of law in holding itself limited by Sabbatino. In either event, the case should be remanded to the Tax Court so as to enable that Court to make findings of fact as to whether the appellant's personalty continued to retain its diplomatic status, and if so, to determine whether the seizure of appellant's personalty constituted a "theft" under Rumanian law or international law.

The Tax Court allowed in evidence applicable provisions of Rumania law relating to "theft", which are a part of the record in this Court. See p. 7, Appellant's Brief, and pp. 2 et seq. of Appellant's Reply Brief herein.

II.

As an additional ground for rehearing and reversal of the Tax Court decision, the appellant states that the Tax Court erred in failing to consider the loss of appellant's personalty as a loss incurred in a transaction entered into for profit, within the meaning of Sec. 23 (a) (2), 1939 I.R.C., now Section 165 (c) (2), 1954 I.R.C. Much of the personalty lost in Rumania by appellant constituted a valuable collection of art objects, etc., in the collection which appellant and Mr. Gunther engaged over a long period of time, and invested large sums of money (J.A. 76-86). See George M. Tyler, 6 T.C. Memo Op Dkt 5508 (1947) and cases cited therein.

CONCLUSION

For the reasons hereinabove set forth, the appellant respectfully moves and petitions this Court for a rehearing herein, and for a reversal of the judgment of the Tax Court of the United States and a remand of the case to that Court for further proceedings not inconsistent with the ruling herein.

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing was mailed this ____ day of September, 1970, to Johnnie M. Walters, Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C. 20001

Bartholomew B. Coyne